Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

EDGAR A. GARCIA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner was extradited from Canada to the United States and pled guilty to one drug-related offense and one firearm offense in federal court. He appealed his sentence on various grounds, including the increase in his sentence based on uncharged drug weights and a homicide offense as violative of the Extradition Treaty. This Court granted Petitioner's certiorari petition on January 8, 2001 and remanded the case to the Eleventh Circuit Court of Appeals for reconsideration in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). On March 9, 2001, the Eleventh Circuit summarily reinstated Petitioner's sentence on the ground that he had not raised the *Apprendi* issue in his initial brief or reply brief before that court in his first appeal from the district court.

This Petition raises four questions: (1) whether an *Apprendi* error in failing to charge all the elements of an offense in the indictment constitutes a "jurisdictional" error that must be noticed by a court at any point in the proceedings, and even sua sponte, and which renders any sentence that exceeds that authorized by the offense supported by the jury's conviction as unconstitutional, requiring the courts to vacate the sentence; (2) whether this Court's "GVR" power is improperly undermined by a Circuit Court's summary reinstatement of its prior decision on the grounds that a defendant has not preserved the issues for review by raising them before that court in the initial appellate briefs; and (3) whether the Court of Appeals erred in requiring Petitioner to preserve the *Apprendi* claim for review, and, if so, whether the Court of Appeals erred in finding that he had not met this burden.

PARTIES TO PROCEEDING

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Edgar Arnold Garcia respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion in *United States v. Garcia,* (No. 97-3222) (unpublished opinion) (March 9, 2001) is printed in the Appendix ("App.") at 1.

JURISDICTION

The decision of the Eleventh Circuit Court of Appeals was rendered on March 9, 2001 (App. 1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Provisions of the following are in the Appendix, at 36-53: U.S. Const., Amendments V, VI; 18 U.S.C. § 2, 18 U.S.C. § 924(c), 21 U.S.C. § 841, 21 U.S.C. § 846, 28 U.S.C. § 2106, F.R.Cr.P. 52.

STATEMENT OF THE CASE

The Petitioner's charges, and the resulting sentences, stem from a 1991 investigation into Petitioner'sdrug-trafficking activities. The investigation revealed that Petitioner and several others were responsible for the shipment of marijuana from Texas to Florida to a group of individuals headed by Marty Cryer. In December of 1990, Marty Cryer was said to have taken a shipment of marijuana without payment (approximately $100,000). In February of 1991, Petitioner dispatched individuals to Florida to search for Cryer to seek either the return of the marijuana or payment. One of the individuals grew weary of the search for Cryer and returned to Texas. Petitioner flew to Florida to replace the individual.

Cryer was located at a hotel in Chiefland, Florida. The three then purchased gloves, a baseball bat, and duct tape, all of which were to be used to restrain and persuade Cryer to pay his debt. They carried guns for their own protection as well (Cryer had a reputation for violence and was believed to have committed drug-related murders).

Cryer was confronted the next day at the hotel. While Petitioner and another individual followed Cryer into his room, another associate (Cryer's adoptive mother) took Cryer's wife and child into another hotel room, next door. Cryer advised Petitioner that he did not have the money to pay the debt and that he had no intention of paying it in the future. Then, when Cryer appeared to be reaching for a weapon, Petitioner, in a panicked fear for his life, fired multiple gun shots at Cryer, causing his death. Petitioner and his two associates, having no escape plans prepared, fled from the hotel, buried the guns, and proceeded to a friend's home in Lakeland, Florida. Petitioner

then traveled by bus to Texas, where he stayed for about four weeks before leaving the country.

The three-count indictment was filed in the Federal District Court for the Northern District of Florida on July 15, 1992. Petitioner was charged with the following: (1) Count I – between January 1, 1990 and February 28, 1991, conspiring to possess with intent to distribute marijuana, in violation of 21 U.S.C. §§ 841 and 846; (2) Count II – between December 1, 1990 and December 17, 1990, possessing with intent to distribute marijuana, in violation of 21 U.S.C. § 841 and 18 U.S.C. § 2; and (3) Count 3 – on or about February 20, 1991, using and carrying a firearm during, and in relation to, a drug trafficking crime, in violation of 18 U.S.C. § 924(c). Neither Count I nor Count II specified the weight of the marijuana charged to Petitioner nor did they specify the subsections of 21 U.S.C. § 841 with which he was charged. (See App. K at 32-33) Additionally, the State of Florida named Petitioner in an indictment charging First Degree Murder in connection with the death of Marty Cryer.

On June 17, 1992, approximately 15 months later, Royal Canadian Mounted Police located Petitioner who was then peacefully apprehended in Toronto. The United States subsequently requested the arrest and extradition of Petitioner. On May 6, 1997, Petitioner was extradited to the United States from Canada.

On July 25, 1997, Petitioner, pursuant to a written plea agreement, entered a plea of guilty as to Counts I and III of the indictment. Petitioner also signed a detailed "Factual Basis for Plea" which set out the circumstances and facts surrounding the drug activity and the shooting of Cryer, with a caveat invoking Petitioner's Fifth

Amendment right against self-incrimination in the shooting of Cryer. The matter was then bound over for sentencing.

In September of 1997, Petitioner reached an agreement with the State of Florida regarding the homicide charge in the shooting of Marty Cryer. Petitioner agreed to plead guilty to Second Degree Murder and receive a seventeen-year sentence which was recommended to run concurrently to the sentence imposed by the federal court.

On October 3, 1997, Petitioner appeared for sentencing in federal district court. Petitioner had submitted written objections to the Probation Officer's PSR recommendations as to several matters, including among others: (1) use of drug amounts in calculating the sentence as the indictment did not include any drug weights nor were any weights proved beyond a reasonable doubt; and (2) the reliance on the homicide for imposing an upward departure, as such conduct was not charged in the federal indictment nor proved in the guilt-innocence stage, nor had it been adjudicated in the State Court where it was charged and pending at the time of sentencing in federal court. After hearing argument from both parties, the district court rejected all of Petitioner's objections.

The offense level was set at 34 and a criminal history category of I, which would yield a sentence range of 151 to 188 months, given an estimated marijuana weight of 498.9 kilograms. The district court imposed an upward departure of five offense levels in order to punish Petitioner for the shooting of Cryer. Thus, Petitioner's offense level was raised to 39, which yielded a range of 262 to 327 months. The court sentenced Petitioner to a total of 360 months, 300 months for the drug charges and 60 months

for the gun possession charge, to be followed by four years of supervised release. The court found subsection (b)(1)(B) of 21 U.S.C. § 841 to be applicable, and, thus, imposed a sentence within the 5-40 year sentencing range for that provision based on the findings of relevant drug weights determined at sentencing.

On October 9, 1997, Petitioner appeared in the Florida State Court and pled guilty to Second Degree Murder, as had been previously negotiated. He was sentenced to an agreed seventeen-year term to run concurrently with the federal term.

Petitioner appealed his federal sentence on several grounds, including the use of uncharged drug offenses and the homicide offense as violating the Extradition Treaty Between Canada and the United States. In addition, although appellate counsel did not raise the voluntariness of the plea issue in the appeal brief, counsel did file a motion to adopt Petitioner's pro-se supplemental appeal brief. The pro-se brief raised two issues: (1) whether Petitioner's plea was unknowingly made and involuntarily entered into as a result of force, threats, or promises; and (2) whether Petitioner was sentenced on the basis of erroneous information regarding drug weights and other allegations. The Eleventh Circuit denied counsel's motion to adopt Petitioner's supplemental appeal brief and exhibits.

Petitioner instructed appellate counsel to withdraw from the record so that he could proceed pro se. Petitioner then filed a pro se Petition for Hearing En Banc calling to the court's attention the intervening indictment issue in *Jones v. United States*, 526 U.S. 227 (1999), and later supplemented the petition with a filing, calling to its attention the intervening decision in *Castillo v. United States*, 530 U.S. 120 (2000), and requesting that the Court

of Appeals apply the reasoning of these decisions to Petitioner's case. The Eleventh Circuit denied Petitioner's Petition for Hearing En Banc.

After the Court of Appeals rendered its decision in Petitioner's case, this Court decided *Apprendi*, this Court's fourth in a recent series of indictment issue cases. Petitioner filed a Petition for Certiorari, arguing that the rule in *Apprendi* should be applied in his case and that the use of uncharged offenses violated the Extradition Treaty Between the United States and Canada. On January 8, 2001, this Court granted certiorari, vacated the Court of Appeals' decision in Petitioner's case, and remanded the case to the Court of Appeals for reconsideration in light of *Apprendi*.

The Court of Appeals reinstated Petitioner's sentence on March 9, 2001, without calling for briefing or oral argument, stating that Petitioner had abandoned the *Apprendi* indictment issue by having failed to raise the issue in his initial or reply brief before that court. (App. A at 1-2)

REASONS FOR GRANTING WRIT

A. THIS COURT SHOULD RESOLVE THE CONFLICTS AMONG THE CIRCUIT COURTS OF APPEAL REGARDING THE SIGNIFICANCE OF AN ERROR UNDER *APPRENDI V. NEW JERSEY*, 530 U.S. 466 (2000), AND SHOULD HOLD THAT THE FAILURE TO ALLEGE AN ELEMENT OF THE OFFENSE IN THE INDICTMENT IS A JURISDICTIONAL ERROR THAT MUST BE NOTICED BY THE COURT AT ANY POINT IN THE PROCEEDINGS AND REQUIRES THAT THE COURT VACATE A SENTENCE IF IT EXCEEDS THE STATUTORY MAXIMUM AUTHORIZED FOR THE OFFENSE ACTUALLY CHARGED IN THE INDICTMENT.

This Court's recent decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), has affected the sentences in dozens, if not hundreds, of cases pending on direct appeal. The definition of an "element" announced in *Apprendi* has had an enormous impact on drug cases, which represent over 40% of the overall federal criminal docket. *See* United States Sentencing Commission, 1999 Datafile, USSC FY99. While it will be a simple matter properly to charge and prosecute drug crimes in the future, the case law shows many rifts on fundamental questions regarding the proper method of appellate review of cases prosecuted before *Apprendi* was decided and in which errors were committed.

In *Apprendi*, this Court heard an appeal from a New Jersey state conviction in which the defendant pled guilty to a charge of second-degree possession of a firearm for an unlawful purpose. *Apprendi*, 530 U.S. at 470. This charge usually carried a penalty range of five to ten years' imprisonment, but the defendant was eligible for sentence enhancement on the basis of New Jersey's "hate

crime" law.[1] The trial judge, at sentencing, found by a preponderance of the evidence that the defendant had violated the hate crime law and sentenced him to twelve years. *Id.* at 471-72. On appeal, this Court addressed the question "whether the Due Process Clause of the Fourteenth Amendment requires that a factual determination authorizing an increase in the maximum prison sentence for an offense from 10 to 20 years be made by a jury on the basis of proof beyond a reasonable doubt."[2] *Id.* at 469-70. Answering in the affirmative, the Court reversed the judgment of the Supreme Court of New Jersey. *Id.* at 499-500.

This Court directly addressed the constitutional issue, rather than focusing on issues of statutory interpretation as it had in *Jones v. United States* and *Castillo v. United States*, two previous cases addressing similar issues.[3] In so doing, the Court held:

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[1] The hate crime law provided for an "extended term" of imprisonment if the trial judge found, by a preponderance of the evidence, that "the defendant in committing the crime acted with a purpose to intimate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity." N.J. Stat. Ann. § 2C:44-3(e) (West Supp. 2000). The hate crime statute authorized an "enhanced" sentence of imprisonment for second degree offenses of "between 10 and 20 years." N.J. Stat. Ann. § 2C:43-7(a)(3).

[2] The Court also noted that another constitutional protection at stake in the case was the Sixth Amendment's "the guarantee that 'in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.' " *Apprendi*, 530 U.S. at 477-78.

[3] *See* Jones v. United States, 526 U.S. 227 (1999) (providing statutory interpretation of federal car jacking statute so as to avoid constitutional violations); Castillo v. United States, 530 U.S. 120 (2000) (providing statutory interpretation of illegal

> In sum, our reexamination of our cases in this area, and of the history upon which they rely, confirms the opinion that we expressed in *Jones*. Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. With that exception, we endorse the statement of the rule set forth in the concurring opinions in that case: "It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt."

Id. at 491-92 (citations omitted).

This Court should address the question of the nature of an error under *Apprendi* for purpose of determining the proper standard of review and the proper remedies. The courts have addressed two different types of errors: (1) failing to charge every element of the offense in the indictment; and (2) failing to prove the element to the jury beyond a reasonable doubt (also discussed as failing to instruct the jury on the element). However, the Courts of Appeals are split in their analysis of the nature of *Apprendi* errors.

In handling cases pending on direct appeal alleging *Apprendi* error, the Courts of Appeal agree (most without explicitly stating it) that because *Apprendi* announced a

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firearm statute to determine whether it created one or two crimes by imposing higher penalty if a "machinegun" is used).

new rule of constitutional procedure, it applies retroactively to all cases pending on direct appeal.[4] *See Griffith v. Kentucky*, 479 U.S. 314 (1987); *Powell v. Nevada*, 511 U.S. 80 (1994). The Courts of Appeals are also nearly unanimous in treating the first type of error – failing to instruct the jury on an element of the offense – as a "trial error" that may affect the constitutionality of the sentence imposed. The courts are, thus, guided by this Court's opinions regarding the proper application of the "plain error" rule for cases in which the error was not preserved for review by means of a timely and specific objection, and the "harmless error" rule for cases in which the error was preserved for review, with the exception of the Fifth Circuit which applies a "de novo review" standard for preserved errors.[5] *See Johnson v. United States*, 520 U.S. 461, 466-67 (1997) (plain error); *United States v. Olano*, 507 U.S. 725 (1993) (plain error); *Neder v. United States*, 527 U.S. 1, 8 (1999) (harmless error); F.R.Cr.P. 52.

There is an even split in the Circuit Courts, however, with four Circuit Courts on each side, regarding the proper way to apply the rules of appellate review in cases in which the statutory maximum exceeds that authorized by the jury's conviction. Four Circuits have affirmed sentences that exceeded the statutory maxima applicable to

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[4] See, e.g., United States v. Nicholson, 231 F.3d 445, 453 (8th Cir. 2000); United States v. Norby, 225 F.3d 1053 (9th Cir. 2000); United States v. Keeling, 235 F.3d 533, 538(10th Cir. 2000).

[5] *See* United States v. Garcia, ___ F.3d ___, 2001 U.S. App. LEXIS 2231, *17-18 (5th Cir. 2001). The Fifth Circuit does apply the "plain error" rule for cases in which error is not preserved. *See* United States v. Meshack, 225 F.3d 556, 575 (5th Cir. 2000).

the offenses that were in fact charged and proved,[6] and four Circuits treat an *Apprendi* error as refuting the *legality* of the sentence or the overall fairness of the proceedings to such an extent that *any* sentence that exceeds the applicable statutory maximum must be vacated, and such errors by their nature meet the requirements of both the harmless error and plain error rules.[7]

The Seventh Circuit's decision in *United States v. Patterson*, 241 F.3d 912, 914-16 (7th Cir. 2001), provides a useful illustration of the manner in which four Courts of Appeal (Fourth, Seventh, Tenth and Eleventh) have reviewed claims of trial error under *Apprendi*. In *Patterson*, on remand from this Court, defendant challenged the trial court's failure to instruct the jury to find the drug weights as an element of the offense. Since the defendants had not asked the district court for such a jury instruction, the Court of Appeals reviewed the case for plain error. Their convictions for trafficking crack cocaine were based on an indictment that did not allege any quantity of drugs and the jury was not instructed to determine quantity. The conviction, thus, supported a 20-year maximum sentence under *Apprendi*. The Seventh Circuit found, however, that the evidence of quantity presented to the jury "so overwhelmingly demonstrated

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[6] *See, e.g.*, United States v. White, ___ F.3d ___, 2001 U.S. App. LEXIS 1379, *15-16 (4th Cir. 2001); United States v. Patterson, 241 F.3d 912, 914-16 (7th Cir. 2001); United States v. Keeling, 235 F.3d 533, 535-39 (10th Cir. 2000); United States v. Candelario, 240 F.3d 1300, 1311 (11th Cir. 2001).

[7] *See, e.g.*, United States v. Doggett, 230 F.3d 160 (5th Cir. 2000); United States v. Rebmann, 226 F.3d 521, 524-25 (6th Cir. 2000); United States v. Yakle, ___F.3d ___, 2001 U.S. App. LEXIS 406, *6-8 (8th Cir. 2001); United States v. Norby, 225 F.3d 1053, 1061(9th Cir. 2000).

that any reasonable jury would have been bound to conclude that the conspiracy encompassed more than 50 grams of crack," thus, justifying sentences up to 40 years. The Court upheld the sentences of four of the defendants which ranged from 310 months to 360 months on this basis. *Id.* at 913-14.

In contrast, the Fifth Circuit's opinion in *United States v. Garcia*, ___ F.3d ___, 2001 U.S. App. LEXIS 2231 (5th Cir. 2001), represents the approach taken by four other Circuit Courts of Appeal (Fifth, Sixth, Eighth, and Ninth). The Fifth Circuit recognizes that *Apprendi* errors, requiring the "clear-cut, mechanical" application of the *Apprendi* rule to the sentences imposed, merit a remedy in every case. *Id.* at *16 n.5. The court treated the case as one in which the error was properly preserved for review and conducted a de novo review. The defendant had challenged his sentence before the district court on the grounds that drug quantity was neither stated in the indictment nor charged to the jury, but he had not raised these objections in his appellate brief or at oral argument. The court nonetheless decided it should consider the issue on its own, stating that "[i]t would be manifestly unfair under the circumstances to ignore the clear-cut, mechanical application of *Apprendi* to Defendant's prison sentence simply because Defendant did not ask for all the relief to which he was entitled." *Id.* at *16 n.5.

When conducting review for plain error, the Fifth Circuit finds that a sentence that exceeds the statutory maximum authorized by the jury's conviction always constitutes "plain error," and that it "affects one's substantial rights" because the defendant is prejudiced by the excessive sentence. *Id.* at 577. The court also finds that all such errors "affect the fairness . . . of the judicial

proceedings" because the defendant would derive a substantial benefit from the court's taking notice of the error in imposing a sentence in excess of that authorized by the conviction. *Id.* 577-78.

In this case, Petitioner was charged with violating Title 21 U.S.C. § 841 which sets out different statutory ranges depending on the amounts of drugs for which a person is held responsible. Clearly, under this Court's dictate in *Apprendi*, if the marijuana quantity increases an offender's statutory maximum beyond that which would apply without regard to proof of quantity, it is an element of the offense, as nine Courts of Appeals have found.[8] Indeed, since this element alone triggers the applicable statutory range, it can be viewed as an essential element of the offense. As such *Apprendi* requires that the quantity must be proven to a jury beyond a reasonable doubt.[9]

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[8] *See* United States v. Houle, ___ F.3d ___, 2001 U.S. App. LEXIS 836 (1st Cir. 2001); United States v. Lewis, ___ F.3d ___, 2000 U.S. App. LEXIS 23772 (4th Cir. 2000); Burton v. United States, 237 F.3d 490 (5th Cir. 2000); United States v. Page, 232 F.3d 536 (6th Cir. 2000); United States v. Nance, 236 F.3d 820 (7th Cir. 2000); United States v. Aguyo-Delgado, 220 F.3d 926 (8th Cir. 2000); United States v. Norby, 225 F.3d 1053 (9th Cir. 2000); United States v. Jones, 235 F.3d 1231 (10th Cir. 2000); United States v. Rogers, 228 F.3d 1318 (11th Cir. 2000).

[9] This Court has not decided whether the Constitution requires that drug weights that enhance a sentence must be treated as elements. The Court has assumed, consistent with the unanimous pre-*Apprendi* decisions of the Courts of Appeals, that the drug weights were intended by Congress to be treated as sentencing factors that are decided by the judge. *See* Almendarez-Torres v. United States, 523 U.S. 224, 236 (1999); Edwards v. United States, 523 U.S. 511, 513-14 (1998). *Edwards* indicates that the question of whether the statutory thresholds under § 841(b) must be presented to the jury "would make a difference" in bolstering the constitutional claims presented. 523 U.S. at 515.

The sentence imposed on Petitioner starkly violates the Constitutional protections of "surpassing importance" of trial by jury and the "companion right to have a jury verdict based on proof beyond a reasonable doubt" recognized in *Apprendi* as deeply rooted in our history and basic to our understanding of justice. 530 U.S. at 477, 479. As this Court explained:

> [T]he "reasonable doubt" requirement "has a vital role in our criminal procedure for cogent reasons." Prosecution subjects the criminal defendant both to "the possibility that he may lose his liberty upon conviction and . . . The certainty that he would be stigmatized by the conviction." We thus require this, among other, procedural protections in order to "provide concrete substance for the presumption of innocence," and to reduce the risk of imposing such deprivations erroneously.

Id. at 485 (quoting *In re Winship*, 397 U.S. 358, 363 (1970)). Defendant objected at the sentencing to the standard of proof being applied to the determination of drug quantities attributed to him and to the accuracy of the drug quantities. It is precisely the concern for accuracy in the fact-finding process that has prompted this Court to articulate the importance of the reasonable doubt standard.

Petitioner does not ask this Court to rule on the proper application of the plain error or harmless error rules in cases in which the jury was not instructed on an element of the charge, as this Court has spoken clearly on the subject in *Johnson*. 520 U.S., at 466-70. Rather, Petitioner asks this Court to consider the effect of the more significant type of error – the failure to charge in the

indictment every element of the offense of which he was convicted and punished.[10]

In Petitioner's case, the Government charged him with possession of marijuana with intent to distribute it and with engaging in a conspiracy to do the same. Neither of the two marijuana charges in the indictment specified the amounts of marijuana involved, nor do they specify the subsection of the statute that applied. Yet, the weight alone triggered the severe penalties of the "separate, aggravated crime," *see Castillo v. United States*, 530 U.S., at 132, for which he was sentenced. Petitioner pled guilty to the first drug count as presented in the indictment and to Count III which charged him with carrying a firearm in relation to the marijuana offense. (App. K at 32-33) Thus, Petitioner argues that his sentence for an aggravated offense violates the Grand Jury Clause of the Fifth Amendment and should be vacated.

In *Apprendi*, this Court did not consider a constitutional claim based on the omission of the racial bias element in the indictment because the Petitioner did not raise that issue. 530 U.S. at 478 n.3. The *Jones* opinion, however, states clearly that "[e]lements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt." 526 U.S. at 232. The Grand Jury Clause of the Fifth Amendment even more directly requires that every element of a felony

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[10] Several of the Circuit Courts have not distinguished between the two types of Apprendi errors and have often treated the two as a single "trial error" subject to the plain error and harmless error rules. *See, e.g.*, United States v. Page, 232 F.3d 536, 543 (6th Cir. 2000); United States v. Yakle, 2001 U.S. App. LEXIS 406, *5-*6 (8th Cir. 2001); United States v. Butler, 2001 U.S.App. LEXIS 1193, *9-*10 (8th Cir. 2001); United States v. Nicholson, 231 F.3d 445, 453 (8th Cir. 2000).

offense, such as that in this case, must be charged in an indictment.

The Fifth Amendment Grand Jury Clause provides that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. Const. amend. V. As this Court has stated:

> [A]n indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense.

Hamling v. United States, 418 U.S. 87, 117 (1974). This understanding of the prerequisites of a sufficient indictment has a long and firmly-rooted history in our constitutional jurisprudence.

In *Ex Parte Bain*, 121 U.S. 1, 4-5 (1887), this Court granted the writ of habeas corpus of a prisoner held who had been convicted of making a false report or statement as cashier of a bank. Prior to trial, and by consent of the defendant, the court ordered the amendment of the indictment to strike out the words "the Comptroller of the Currency and" from the statement charging the defendant with acting "with intent to deceive the Comptroller of the Currency and the agent appointed to examine the affairs of said association . . . " *Id.*

Justice Miller states, "Undoubtedly the framers . . . had for a long time been absorbed in considering the arbitrary encroachments of the crown on the liberty of the subject, and were imbued with the common law estimate of the value of the grand jury as part of its system of criminal jurisprudence." *Id.* at 12. The Court found that "an indictment found by a grand jury was indispensable

to the power of the court to try the petitioner for the crime with which he was charged." *Id.* at 12-13. Thus, the Court had "no difficulty in holding that the indictment on which he was tried was no indictment of a grand jury. . . . [A]fter the indictment was changed it was no longer the indictment of the grand jury who presented it." *Id.* at 13.

The amendment to the indictment so altered the offense that it no longer charged the offense on which the Grand Jury had voted to indict the defendant. There being no other offense charged in the indictment, the Court explained that as a result of the amendment, the court no longer had jurisdiction to prosecute the defendant for any offense:

> It is of no avail, under such circumstances, to say that the court still has jurisdiction of the person or of the crime; for, though it has possession of the person, and would have jurisdiction of the crime, if it were properly presented by indictment, the jurisdiction of the offence is gone, and the court has no right to proceed any further in the progress of the case for want of an indictment. . . . There was nothing before the court on which it could hear evidence or pronounce sentence.

Id.

The trial court had permitted the amendment on the ground that the stricken language was surplusage, and, thus, that the defendant was not prejudiced by the change. The trial court also stated that the grand jury would have found the indictment without this language. *Id.* at 9. This Court rejected this proposition, stating:

> If it lies within the province of the court to change the charging part of an indictment to suit its own notions of what ought to have been, or what the grand jury would probably have made it if their attention had been called to

> suggested changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, without which the Constitution says "no person shall be held to answer," may be frittered away until its value is almost destroyed.

Id. at 10.

In *Stirone v. United States*, 361 U.S. 212, 217 (1960), this Court reaffirmed the ruling of *Ex Parte Bain* "that a court cannot permit a defendant to be tried on charges that are not made in the indictment against him." *Stirone* involved the admission of evidence to prove an allegation not charged in the indictment. The Court found the effect of the admission of the evidence to be the same as a formal amendment of the indictment, as in *Ex Parte Bain*. *Id.*

The defendant was charged with a federal extortion offense which required proof of two essential elements: interference with commerce, and extortion. The indictment charged the defendant with interfering with interstate commerce by means of movement of sand from outside Pennsylvania to a concrete manufacturing plant in the state. At trial, however, the court permitted the Government to offer evidence of the defendant's interference with the sand shipments mentioned in the indictment, but also with interstate steel shipments from a Pennsylvania steel-processing plant.

This Court found that it could not presume that the grand jury would have indicted the defendant on the later-added allegation of interfering with commerce, nor could it presume that the trial jury found the defendant guilty of interfering with commerce by the means charged in the indictment. It stated in this regard:

> [N]either this nor any other court can know that the grand jury would have been willing to charge that Stirone's conduct would interfere with interstate exportation of steel . . . And it cannot be said with certainty that with a new basis for conviction added, Stirone was convicted solely on the charge made in the indictment the grand jury returned.

Id. at 217.

In Petitioner's case, the indictment did not charge him with an aggravated offense under 21 U.S.C. § 841 (b)(1)(B). Petitioner had no way of knowing from the face of the indictment what statutory range he faced. As this Court has made clear in *Apprendi*, with the exception of prior convictions, any factor that increases the statutory maximum for an offense is an element of the offense. Clearly, the weight of the drugs involved in a drug case, if they are relied upon to increase the statutory maximum – as in Petitioner's case – must be viewed as an element and pled in the indictment.

In order to sentence Petitioner for the aggravated offense under § 841(b)(1)(B), the Government was required to state the quantity of drugs that Petitioner was alleged to have possessed. The failure to do so denied him of the protections that the Grand Jury Clause, as well as the Due Process and Sixth Amendment jury trial rights, are designed to protect: (1) to fairly inform the defendant of all the elements of the charges against him so that he may prepare his defense; (2) to enable the defendant to plead double jeopardy in defense of future prosecutions for the same offense; and (3) to protect a citizen from unfounded accusation by interposing a body of 16-23 persons who must approve all charges before they may be brought. *See United States v. Tran*, 234 F.3d 798, 805 (2d Cir. 2000); *Ex Parte Bain*, 121 U.S. at 11.

At most, the indictment in this case, which omitted any reference to the quantity of marijuana, should be viewed as charging only the least punitive marijuana offense listed in the statute as that is the only offense authorized by the indictment. The offense authorized by an indictment that fails to charge any weight of marijuana is arguably the offense applicable to offenses involving small amounts and for which there was no evidence of remuneration found in 21 U.S.C. § 841(b)(4), providing for a statutory maximum of 1-year imprisonment, or at most the 5-year maximum of subsection (b)(1)(D).[11] Thus, Petitioner's sentence of 360 month far exceeds the 12-month or 60-month ranges of the lesser offenses that require no proof of drug quantities.

Petitioner did not waive the right to object to the sufficiency of the indictment by pleading guilty. *Tran*, 234 F.3d, at 806. "Waiver" of an indictment as that concept is understood "is an act clothed in formality . . . [and] must be made in open court, defendants must be informed of the nature of and the cause for the accusation, and the court must be satisfied that the defendants waive their rights knowingly, intelligently and voluntarily." *United States v. Ferguson*, 758 F.2d 843, 850-51 (2d Cir. 1985). As this Court explained in *Menna v. New York*, 423 U.S. 61, 62-63 (1975), "[a] guilty plea . . . renders irrelevant those constitutional violations not logically inconsistent with

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[11] Section 841(b)(4) provides a one-year maximum for persons who distribute a small amount of marihuana for no remuneration and who have no prior conviction. *See, e.g.*, United States v. Lowe, ___ F.Supp.2d ___, 2000 U.S. Dist. LEXIS 19965 (S.D.W.V. 2000) (holding that if an indictment charges distribution of marijuana "without more" the constitutional protections outlined in *Apprendi* require that Subsection (b)(4) must apply).

the valid establishment of factual guilt. . . . We hold that a plea of guilty to a charge does not waive a claim that – judged on its face – the charge is one which the State may not constitutionally prosecute." *See also, Tran*, 234 F.3d at 806; *United States v. Spinner*, 180 F.3d 514, 516 (3d Cir. 1999). In addition, *Ex Parte Bain* stands for the proposition that an indictment cannot be amended in any way, even with the consent of the defendant. 121 U.S. at 9. In this case, the Petitioner was on notice that the Government sought to impose sentence under Subsection (b)(1)(B)'s 5-40 year range. However, "notice alone cannot form a sufficient basis to validate a jurisdictionally defective indictment." *Spinner*, 180 F.3d at 516.

Moreover, the erroneous omission is not subject to plain or harmless error analysis as it is jurisdictional in nature. Where an indictment fails to allege each material element of the offense, it fails to charge that offense. A reviewing court cannot allow such a conviction and sentence to stand and must notice jurisdictional errors. As stated in Federal Rules of Criminal Procedure, Rule 12(b)(2), an objection that an indictment "fails to show jurisdiction in the court or to charge an offense . . . shall be noticed by the court at any time during the pendency of the proceedings." Indeed, the Grand Jury Clause would be violated by a judicial proceeding that convicted and sentenced a person for an offense not charged in the indictment, and such an error is so fundamental, that this Court and the Courts of Appeal have repeatedly considered the error "fatal" and cannot be considered harmless under any circumstances. *See Ex Parte Bain*, 121 U.S. at 13; *United States v. Prentiss*, 206 F.3d 960, 976 (10th Cir. 2000); *United States v. Cabrera-Teran*, 168 F.3d 141, 143 (5th Cir. 1999); *United States v. Bo*, 186 F.3d 1177, 1181 (9th Cir. 1999); *United States v. Rudisill*, ___ F.3d ___, 2000 U.S. App.

LEXIS 10380, *3 (4th Cir. 2000) (failure to allege essential element constitutes structural error); *Tran*, 807-808; *but see United States v. Mojica-Baez*, 229 F.3d 292 (1st Cir. 2000) (finding that failure to allege an element is not "structural error," and, therefore, is subject to harmless error analysis).

Petitioner requests that this Court grant the writ and should hold, consistent with the importance of the constitutional protections at stake, that the failure to allege the drug weights in a drug prosecution case under 21 U.S.C. § 841 in which the weights were relied upon to enhance the sentence violates the Grand Jury Clause of the Fifth Amendment and is jurisdictional error that requires the sentence to be vacated and remanding the case for resentencing consistent with the charges as stated in the indictment.

B. THE ELEVENTH CIRCUIT'S DECISION SUMMARILY TO DISPOSE OF PETITIONER'S CASE ON REMAND FROM THIS COURT BY REINSTATING ITS PRIOR DECISION MISCOMPREHENDS THIS COURT'S "GVR" INSTRUCTION TO "RECONSIDER" THE CASE IN LIGHT OF THE INTERVENING DECISION IN *APPRENDI*, THUS WARRANTING PLENARY REVIEW BY THIS COURT.

The Eleventh Circuit's reinstatement of Petitioner's sentence effectively negates this Court's power to grant certiorari, vacate a lower court's decision, and remand for reconsideration in light of an intervening decision, commonly referred to as its "GVR" power. As this Court made clear in *Lawrence v. Charter*, 516 U.S. 163, 166 (1996), Congress has granted this Court, under Title 28 U.S.C. § 2106, a "broad power to GVR." In *Lawrence*, this Court affirmed the importance of the GVR order, noting that "over the past 50 years, [it has] become an integral part of

this Court's practice, accepted and employed by all sitting and recent Justices." *Lawrence*, at 166. The important virtues of the GVR were summarized as follows:

> In an appropriate case, a GVR order conserves the scarce resources of this Court that might otherwise be expended on plenary consideration, assists the court below by flagging a particular issue that it does not appear to have fully considered, assists this Court by procuring the benefit of the lower court's insight before we rule on the merits, and alleviates the "potential for unequal treatment" that is inherent in our inability to grant plenary review of all pending cases raising similar issues.

Id. at 167 (citing *Griffith v. Kentucky*, 479 U.S. 314 (1987), for the proposition that the Court "fulfill[s] [its] judicial responsibility by instructing lower courts to apply the new rule retroactively to cases not yet final"). In addition, the GVR power is properly exercised in cases of "confessions of error or other positions newly taken by the Solicitor General." *Lawrence*, at 166-67.

More important, this Court commented on the meaning of a GVR, which had previously not been clear to the lower courts:

> Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is, we believe, potentially appropriate.

Id. at 167-68.

This Court's decision in *Stutson v. United States*, 516 U.S. 193 (1996), highlights the special importance of the GVR in criminal cases. As this Court explained, "[w]hen a litigant is subject to the continuing coercive power of the Government in the form of imprisonment, our legal traditions reflect a certain solicitude for his rights, to which the important public interests in judicial efficiency and finality must occasionally be accommodated." *Id.* at 196. Thus, the GVR order in *Stutson* was issued in order to "guarantee[ ] to the petitioner full and fair consideration of his rights in light of all pertinent considerations, and is also satisfactory to the Government." *Id.* at 197.

In other cases in which the lower courts have not followed this Court's instruction to reconsider a case in light of intervening developments, this Court has granted plenary review. For example, in *United States v. Sharpe*, 470 U.S. 675, 680 (1985), this Court had GVR'd the Fourth Amendment search case for reconsideration in light of the intervening decision of this Court in *United States v. Ross*, 456 U.S. 798 (1982), which the Court of Appeals had not considered. The Court of Appeals reached the same decision on remand that it had in the first instance, finding that in light of *Ross* it was required to "disavow" its primary holding, but was not precluded from affirming its other holding. The Court of Appeals declined to apply the principal holding of *Ross*, reasoning that its action complied with the mandate to reconsider in light of *Ross*. *Id.* at 681. The lower court assumed that " 'had this Court felt that a reversal was in order, it could and would have said so.' " *Id.* This Court granted plenary review and reversed. *Id.; see also Henry v. City of Rock Hill*, 376 U.S. 776 (1964) (U.S. Supreme Court GVR's case to Supreme Court of South Carolina for reconsideration in light of intervening case of *Edwards v. South Carolina*, 372 U.S. 229

(1963); state Supreme Court found *Edwards* case not controlling and reaffirms its earlier decision; U.S. Supreme Court grants plenary review and reverses).

Ironically, this Court has viewed the GVR order as a means of "respect[ing] the dignity of the Court of Appeals by enabling it to consider potentially relevant decisions and arguments that were not previously before it." *Id.* Yet, in Petitioner's case the response of the Court of Appeals in summarily disposing of his case on remand from this Court and reinstating its prior decision would appear not to respect the instruction of this Court to reconsider the case in light of intervening caselaw. For purposes of judicial efficiency and fairness to the Petitioner, this Court should grant plenary review of his case in order to grant him "full and fair consideration of his rights in light of all pertinent considerations," as the GVR was designed to do but which it did not accomplish in this case.

In addition, the Solicitor General's Brief in response to Petitioner's Petition for a Writ of Certiorari specifically suggested that the Eleventh Circuit's previous decision should be vacated for reconsideration in light of *Apprendi* and comes very close to confessing error in Petitioner's case. (App. O at 56-57) ("We note that, even assuming error in this case, . . . "). Thus, there were two separate grounds for issuing the GVR: to give the lower court the opportunity to consider the intervening decision in *Apprendi* and because the Solicitor General practically confesses error in Petitioner's case under *Apprendi*.

The Court should grant plenary review in order to better instruct the lower court regarding the proper application of the intervening *Apprendi* decision to a case such as Petitioner's. By now, most Courts of Appeals have spoken on the subject of applying *Apprendi* to pending

drug cases, so the time is ripe for this Court to rule on this subject. It is an issue of utmost importance in light of the prevalence of drug cases in federal courts.

C. THE ELEVENTH CIRCUIT ERRED IN FINDING THAT PETITIONER WAS REQUIRED TO PRESERVE *APPRENDI*-TYPE ERROR FOR REVIEW, AND, ALTERNATIVELY, IF PETITIONER IS REQUIRED TO HAVE PRESERVED THE ERROR, THE COURT ERRED IN FINDING THAT HE HAD NOT MET THIS BURDEN.

This Court remanded Petitioner's case for reconsideration in light of *Apprendi*. (App. B at 3) Other Courts of Appeals have provided appellate review to all such remanded cases, even if the defendant made the *Apprendi* claim for the first time in his or her petition for certiorari.[12] In such cases, the courts review the cases for plain error. In Petitioner's case, the Eleventh Circuit did not follow the procedure followed by the other Circuit Courts which have called for supplemental briefs on the *Apprendi* issues and schedule oral arguments.[13] Instead, the Eleventh Circuit erroneously concluded in its summary decision that he abandoned his right to raise an *Apprendi* claim by failing to raise it in their first appellate briefs on appeal, and, thus, has denied even review for plain error. (App. A at 1-2) *See United States v. Ardley*, 242 F.3d 989 (11th Cir. 2001); *United States v. Potts*, (No. 99-4129) (11th Cir. 2001) (unpublished). Indeed, even the Government's brief to this Court filed in response to

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[12] *See, e.g., Mojica-Baez*, 229 F.3d, at 296; United States v. Hughes, ___ F.3d ___, 2001 U.S. App. LEXIS 3579, 2-*3 (7th Cir. 2001).

[13] *Id.*

Petitioner's first petition for certiorari virtually conceded error and recommended that the Court remand the case for plain error review by the Court of Appeals. (App. O at 56-57)

Under this Court's decisions *Johnson v. United States*, 520 U.S. 461 (1997) and *United States v. Olano*, 507 U.S. 725 (1993), Petitioner is entitled to review by the Court of Appeals. The *Apprendi* decisions announced a new rule of constitutional procedure affecting criminal cases and must be applied retroactively to all cases pending on direct appeal. *See Johnson*, 520 U.S., at 467 (citing *Griffith v. Kentucky*, 479 U.S. 314 (1987)). This Court in *Griffith* recognized that it is necessary to permit retroactive application in order to avoid the unfairness of granting relief in one case while rejecting the same claim in other similar cases. 479 U.S. at 323.

The rationale for requiring that criminal defendants preserve errors for review, is, of course one judicial efficiency and finality. This Court's decision in *Johnson*, however, recognizes that a defendant cannot be expected to object to a trial error, if, based on the current law, it is not error at that time. If after the trial, an intervening decision renders the trial court's action erroneous, a defendant may raise the issue on appeal, even if there was no objection at trial. The error will be reviewed for plain error in that case. *Johnson*, 520 U.S., at 464.

Petitioner's case, like *Johnson*, involves a situation in which there was no objection during the initial appellate briefs, however, these were submitted *before* this Court's decision in *Apprendi* or *Jones*. In addition, Petitioner did contest the estimations of drug weights in his case and brought the *Jones* and *Castillo* decisions to the attention of the Eleventh Circuit promptly after the decisions were

handed down (after the issuance of the court's first opinion), asking that they be considered in considering his Petition to Hear En Banc.

Petitioner prepared a pro se supplemental brief which his appellate attorney agreed to file for him. This brief raised the claim that the drug weights were erroneous and inflated. (App. T at 82-85) The Court of Appeals refused to take notice of this pro se filing. (App. I at 19) Petitioner then instructed appellate counsel to withdraw from the record so that Petitioner could proceed pro se. The Eleventh Circuit granted counsel's motion to withdraw. (App. E at 14) Petitioner filed a pro se Petition for Rehearing En Banc which called to the court's attention the intervening decision in *Jones v. United States*, 526 U.S. 227 (1999). Petitioner wrote:

> In *Jones v. United States*, 526 U.S. ___, 143 L.ed 2d 311 (1999), serious bodily injury, an element of the offense was not pled in the indictment. . . . In the case at bar the murder and Louisiana [drug] dealings were not merely unpled elements but rather are separate offenses which were not indicted and which the defendant did not plead guilty to.

(App. P at 59-60) Moreover, six days after this Court's decision in *Castillo v. United States*, 530 U.S. 120 (2000), Petitioner filed a pro se request for the Eleventh Circuit to take notice of the decision and apply it to his case. Petitioner explained:

> In *Castillo*, the Supreme Court again decided "whether words in a federal criminal statute create offense elements (determined by a jury) or sentencing factors (determined by a judge). . . . In the case at bar not only is the murder an unpled element but the statute itself [does not] contain the language "murder" at all. The uncharged murder is clearly a separate

> offense not just meeting but exceeding the "separate crime" standard set forth in *Castillo*.

(App. S at 79)

Petitioner offers the fact of the filings as evidence that he made every effort within his power to raise challenges to the drug weights for which he was being held accountable and raised the constitutional challenge via the *Jones* decision. As this Court has long recognized, the allegations of a pro se litigant should be held "to less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner*, 404 U.S. 652, 654 (1972). At a minimum, Petitioner sufficiently raised the claim of *Apprendi*-type error for purposes of preserving his right to appellate review of the issue on remand from this Court – if indeed it is necessary to do so.

If it was error not to raise the objection on appeal, then on remand from this Court, the Court of Appeals should have applied the plain error rule. This Court distinguished between a "waiver" of a known right and the "forfeiture" of a claim of error for purposes of preserving the error for review in *Olano*, 507 U.S. at 733-34. This Court explained:

> Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the "intentional relinquishment or abandonment of a known right." . . . Mere forfeiture, as opposed to waiver, does not extinguish an "error" under Rule 52(b). . . . If a legal rule was violated during the district court proceedings, and if the defendant did not waive the rule, then there has been an "error" within the meaning of Rule 52(b) despite the absence of a timely objection.

Id. Petitioner certainly did not "waive" the claim of error, as this Court has defined the concept.

This Court should grant the writ in order to clarify the correct standard of review upon remand in which there has been an intervening decision of this Court. The Eleventh Circuit's decisions in cases like Petitioner's do a grave injustice to defendants for whom the courthouse doors are shut because of the Circuit Court's erroneous application of this Court's precedents regarding retroactivity and the plain error rule.*

CONCLUSION

This Court should grant this petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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* If the writ is granted, Petitioner would also seek leave to brief the other claims made in his initial petition for a writ of certiorari.

APPENDIX

A. Opinion of the Court of Appeals for the Eleventh Circuit..... App. 1

B. Opinion of the Supreme Court of the United States, January 8, 2001..... App. 3

C. Opinion of the Court of Appeals for the Eleventh Circuit, April 10, 2000..... App. 4

D. Order of the Court of Appeals for the Eleventh Circuit, April 10, 2000..... App. 13

E. Motion to Withdraw to the Court of Appeals for the Eleventh Circuit, October 8, 1999.....App. 14

F. Letter of September 28, 1999..... App. 16

G. Order of the Court of Appeals for the Eleventh Circuit, September 15, 1999..... App. 17

H. Order of the Court of Appeals for the Eleventh Circuit, May 19, 1999.....App. 18

I. Order of the Court of Appeals for the Eleventh Circuit, July 17, 1998..... App. 19

J. Judgment in a Criminal Case, District Court, Northern District of Florida at Gainesville, October 3, 1997.....App. 20

K. Indictment from the District Court, Northern District of Florida at Gainesville, July 15, 1992.....App. 32

L. Order of the Court of Appeals for the Eleventh Circuit Denying the Petition for Rehearing and Suggestion for Rehearing en banc, June 14, 2000.....App. 34

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M. Constitutional Provisions..... App. 36

N. Statutes and Rules.....App. 37

O. Excerpts from Brief for the United States before the Supreme Court of the United States, November 2000, pages 6-8.....App. 54

P. Petition for Hearing En Banc before the Court of Appeals for the Eleventh Circuit.....App. 58

Q. Excerpts from Corrected Brief of Appellant before the Court of Appeals for the Eleventh Circuit, April 20, 1998, pages 9-17..... App. 66

R. Excerpts from Reply Brief of Appellant before the Court of Appeals for the Eleventh Circuit, June 23, 1998, pages 1-4..... App. 75

S. Pro Se Filing entitled "Consideration of Intervening and New Developments" before the Court of Appeals for the Eleventh Circuit, June 11, 2000.....App. 79

T. Excerpts from Motion to Adopt Supplemental Pro Se Pleadings before the Court of Appeals for the Eleventh Circuit, March 8, 1999, pages 38-40..... App. 82

U. Excerpts from Defendant's Sentencing Memorandum before the U.S. District Court, September 25, 1997, pages 23-28, 49-52, 59-62.....App. 86

APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-3222

D.C. Docket No. 92-01027-CR-MMP

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EDGAR ARNOLD GARCIA,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Florida

(March 9, 2001)

ON REMAND FROM THE SUPREME COURT
OF THE UNITED STATES

Before EDMONDSON, CARNES and WATSON*, Circuit Judges.

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* Honorable James L. Watson, United States Court of International Trade, sitting by designation.

PER CURIAM:

We previously affirmed the conviction and sentence in this case. *See United States v. Garcia*, 208 F.3d 1258 (11th Cir. 2000). The Supreme court has vacated our judgment and remanded the case to us for further consideration in light of *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000). Having reconsidered our decision as instructed by the Supreme Court, we reinstate our judgment affirming the conviction and sentence.

Garcia did not raise the *Apprendi* issue to us in either his initial brief or in his reply brief. As we explained in our very recent decision in *United States v. Ardley*, ___ F.3d ___ (Feb. 20, 2001), nothing in the *Apprendi* decision obligates us to consider an issue not properly raised in the briefs that an appellant filed with us, nor does the Supreme Court's remand order require us to treat the case as though the *Apprendi* issue had been timely raised and properly argued in this Court. *See also, United States v. Nealy*, 232 F.3d 825, 830 (11th Cir. 2000) ("Defendant abandoned the [*Apprendi*] indictment issue by not raising the issue in his initial brief.").

Our prior opinion affirming the conviction and sentence in this case, *United States v. Garcia*, 208 F.3d 1258 (11th Cir. 2000), is REINSTATED.

APPENDIX B

OPINION OF THE SUPREME COURT OF THE UNITED STATES, JAN. 8, 2001

00-463 GARCIA, EDGAR A. V. UNITED STATES

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of *Apprendi v. New Jersey*, 530 U.S. ___ (2000).

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-3222

D.C. Docket No. 92-01027-CR-MMP

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EDGAR ARNOLD GARCIA,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Florida

(April 10, 2000)

Before EDMONDSON and CARNES, Circuit Judges, and WATSON*, Senior Judge.

WATSON, Senior Judge:

This appeal from a sentencing raises three issues; whether the sentencing violated the terms of the treaty under which defendant was extradited from Canada, whether the sentencing court erred in finding that the defendant had obstructed justice and finally, whether it

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* Honorable James L. Watson, Senior Judge, United States Court of International Trade, sitting by designation.

erred in finding that defendant had not demonstrated acceptance of responsibility.

I. BACKGROUND

In the last half of 1990 the appellant, then located in Texas, organized the supply of marijuana to co-conspirators in Florida. One of the co-conspirators, Marty Cryer, appropriated an amount of 117 pounds for himself and did not pay appellant for it. Appellant located Cryer in Chiefland, Florida and shot him to death on February 20, 1991. Appellant hid out in Texas for about four weeks and then fled to Canada. About 16 months after the murder he was arrested in Canada on June 17, 1992. On June 15, 1992 a three-count indictment was returned against appellant in the Northern District of Florida and an order for arrest was issued on June 23, 1992. The counts of the indictment were for conspiracy to distribute marijuana, possession of marijuana and using a firearm in connection with the foregoing. There followed almost five years of judicial proceedings in Canada regarding appellants extradition to the United States which ultimately took place in May of 1997.

On October 3, 1997, following defendant's extradition from Canada and his pleas of guilty first, to conspiring to distribute marijuana and to possess it with the intent to distribute it and second, to using and carrying a firearm in connection with the marijuana conspiracy, he was sentenced to 300 months imprisonment on the marijuana conspiracy charge and 60 months imprisonment consecutively on the firearm charge.

II. DISCUSSION

The marijuana conspiracy involved shipments of marijuana from Texas to Florida. In determining relevant conduct under the Sentencing Guidelines and in departing upward from the Guideline range the sentencing judge considered other marijuana dealings engaged in by the defendant beyond those to which he pleaded guilty, namely shipments to Louisiana. In departing from the Guideline range the sentencing court also relied on defendant's murder of Marty Cryer, the distributor of defendant's marijuana in Florida who had refused to pay his debt to defendant. There was abundant evidence before the sentencing judge to support the conclusion that defendant had murdered Cryer and had also been involved in marijuana shipments to Louisiana.

The only question before this court is whether consideration of these two courses of conduct in the sentencing (the murder and the Louisiana dealings) violated the provision in the *Treaty of Extradition Between the United States and Canada* that "[a] person extradited . . . shall not be detained, tried or punished . . . for an offense other than that for which extradition has been granted." As a question involving the interpretation of a treaty, this issue is subject to plenary review in this court. *United States v. Puentes*, 50 F.2d [sic] 1567, 1575 (11th Cir. 1995).

The principle thus stated in the treaty is known as the "doctrine of speciality."

The question must be resolved in accordance with the law of the United States. While the law and position of

the surrendering state may be considered, it is not controlling.

As it happens, Canada was well aware of the additional conduct ascribed to defendant and has acquiesced to the procedure by which such conduct is considered in sentencing. This court is therefore faced solely with the defendant's claim that his rights under the treaty were violated.

Stated differently, the question is whether the operation of the Sentencing Guidelines in this case caused defendant to be punished for any offenses other than the ones for which extradition was granted. The short answer is that defendant was not punished for crimes other than those for which he was extradited because under our law, the consideration of other conduct in the sentencing process is legally and conceptually a part of the punishment for the inducted [sic] crimes and within the limits set for those crimes.

The doctrine of speciality, as interpreted in our law, does not call for the extradition crime to be handled in a vacuum, in any of its phases. Thus, for example, an indictment in existence at the time of extradition can be lawfully superseded after extradition by an indictment charging larger quantities of drugs. *United States v. Puentes*, 50 F.3d 1567 (11th Cir. 1995). *See also United States v. Abello-Silva*, 948 F.2d 1168 (10th Cir. 1991); *United States v. Ross*, 545 F.2d 814 (2d Cir. 1976); *United States v. Barontian*, 299 F.2d 486 (2d Cir. 1961).

In the same vein, the doctrine of speciality does not control the evidentiary procedural rules of American Courts. For example, it is not violated by the admission of

evidence of crimes for which a defendant was not extradited if that evidence is relevant to the crime charged. Thus, evidence of money-laundering (for which extradition was specifically refused) was nevertheless admissible as evidence within the trial court's discretion for the purpose of proving a drug conspiracy (the crime for which extradition was granted). *United States v. Alvarey-Moreno,* 874 F.2d 1402, 1413-14 (11th Cir. 1989). Similarly, even in the face of a refusal by a foreign government to extradite for aiding and abetting a drug conspiracy under 18 U.S.C. § 2, the doctrine of speciality was held not to preclude the instruction of the jury on the theory of vicarious liability approved in *Pinkerton v. United States,* 328 U.S. 640 (1946), *United States v. Gallo-Chamarro,* 48 F.3d 502, 11th Cir. 1995.

With respect to the doctrine of speciality and U.S. law governing sentencing the doctrine of speciality does not restrict the scope of proof of other crimes that may be considered in the sentencing process. The distinction is thus drawn between proof of other crimes as a matter germane to the determination of punishment for the extradited crime and proof of other crimes in order to exact punishment for those other crimes. Only the latter course is forbidden by the doctrine of speciality.

Appellant also challenges the District Court's enhancement of his sentence for obstruction of justice. The factual findings involved in such an enhancement are reviewed by this court for clear error. The application of the law to those factual findings is reviewed *de novo, United States v. Arguedas,* 86 F.2d [sic] 1054, 1059 (11th Cir. 1996). The sentencing court made this finding by stating that "it is clear to this Court beyond a reasonable doubt

this defendant did obstruct and attempt to obstruct justice by all of the activities following the murder,. . . . " The Court found the position of the probation office on the question of obstruction to be the correct one. That position advocated enhancement for 3 reasons; first the burying of the guns, second, the instruction to the secretary and third, the flight to Canada.

The factual and legal sufficiency of the destruction of evidence ordered by defendant is such that discussion of the burial of the guns and the flight to Canada is not needed.

The enhancement of a sentence for obstruction of justice is governed by Section 3C1.1 of the Sentencing Guidelines. Application Note 3 provides the following:

> destroying or concealing or procuring another person to destroy or conceal evidence that is material to an official investigation or judicial proceeding (e.g., shredding a document or destroying ledgers upon learning that an official investigation has commenced or is about to commence), or attempting so to do; however, if such conduct occurred contemporaneously with arrest (e.g., attempting to swallow or throw away a controlled substance), it shall not, standing alone, be sufficient to warrant an adjustment for obstruction unless it resulted in a material hindrance to the official investigation or prosecution of the instant offense or the sentencing of the offender.

When appellant pled guilty the written factual basis acknowledged by him contained an account of how, after the murder of Cryer, he asked his secretary to go to his

apartment to remove money and cocaine and burn handwritten financial records, photographs of a man and a map showing locations in Florida. The government's discussion of these matters at the sentencing noted that these were photographs understood by the secretary to be of Cryer and a map understood by her to relate to his location.

Appellant makes a strained argument that his conduct did not amount to obstruction either because no federal investigation was underway or was not a hindrance because the investigation had abundant evidence from other sources.

These arguments are flimsy if not frivolous. There is no requirement that defendant's obstructive acts occur subsequent to the formal commencement of an investigation and we find no authority for that proposition. To the contrary, the modification of an attic to conceal a methamphetamine laboratory has been considered evidence of obstruction. *United States v. Query*, 928 F.2d 383, 386 (11th Cir. 1991).

In any event, the record shows that appellant was under investigation prior to the murder of Cryer, from at least the time two months earlier when police seized money sent to him as drug payments via Federal Express by Cryer's wife.

It is plain that the above quoted sentencing guidelines are not intended to create a formal date for the measurement of obstructive acts but rather, to distinguish those acts that are instinctively done in the heat of being caught engaged in the crime from those done before or after with cool calculation. Sending someone to destroy

evidence located elsewhere is clearly an obstructive act and the sentencing judge was fully justified in so finding whether or not it actually hindered an investigation. The "actual hinderance" test is only for those acts done at the time of arrest. *United States v. Rowlett*, 23 F.3d 300, 305-306 (10th Cir. 1994). In short, the key to a finding of obstruction is the intention of the actor, not the actual success of his obstructive acts. *United States v. Revel*, 971 F.2d 656, 660-661 (11th Cir. 1992) cert. denied in *Pullam v. United States*, 113 S. Ct. 1665; cert. denied, 113 S. Ct. 1828.

Appellant's final argument is that the sentencing court erred in finding that he had failed to show the acceptance of responsibility for his offense that would warrant a reduction under Sentencing Guidelines § 3E1.1. Such a showing is a defendant's burden. *United States v. Spraggins*, 868 F.2d 1541, 1543 (11th Cir. 1989). Appellant stresses his guilty plea as a demonstration of acceptance. But that falls far short of showing acceptance of responsibility in circumstances characterized by active avoidance of responsibility from the start to near the finish. The record is replete with evidence supporting the sentencing judges finding, ranging from the destruction of evidence, hiding out, living under an assumed name in Canada, to frivolous denials of overwhelming identification evidence after he was arrested there, and a frivolous claim in Canada that he was subject to a federal death penalty if extradited (after the only possible death penalty by the state of Florida had been waived). The appellant fell short of showing entitlement to a reduction for acceptance of responsibility merely because he ultimately pleaded guilty. App. Note 3 to § 3E1.1.

III. CONCLUSION

For the reasons given above, the sentence imposed in the judgment below is AFFIRMED and the appeal therefrom is denied.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 97-3222-CC

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EDGAR ARNOLD GARCIA,

Defendant-Appellant.

On Appeal from the United States District Court for the Northern District of Georgia

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ORDER:

(Filed Apr. 10, 2000)

The motion to withdraw filed by Appellant's retained attorneys, Marcia G. Shein and Richard D. Biggs, is GRANTED.

/s/ J.L. Edmonds
UNITED STATES CIRCUIT JUDGE

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,	:	
Plaintiff/Appellee,	:	**CASE NO. 97-3222**
vs.	:	
EDGAR ARNOLD GARCIA,	:	
Defendant/Appellant.	:	

MOTION TO WITHDRAW

COMES NOW, Counsels, **MARCIA G. SHEIN and RICHARD D. BIGGS,** and respectfully requests that they be released from the above-referenced action as attorney of record pursuant to Defendant's request and based on irreconcilable differences and conflicts. (See attached).

/s/ Marcia G. Shein
MARCIA G. SHEIN
52 Executive Park S.,
Suite 5203
Atlanta, GA 30329
(404) 633-3797/
633-7980 (Fax)

/s/ Richard D. Biggs
RICHARD D. BIGGS
52 Executive Park S.,
Suite 5203
Atlanta, GA 30329
(404) 633-3797/
633-7980 (Fax)

CERTIFICATE OF SERVICE

I hereby certify that I have this date mailed a copy of the foregoing to the Assistant Unite States Attorney, **MICHAEL SIMPSON,** 315 S. Calhoun Street, Suite 510, Tallahassee, Florida 32301, and Appellant **EDGAR A.**

GARCIA, Reg. No. 10753-017, USP-BMP, Box 26030, Beaumont, Texas 77720, by depositing a copy of same in the United States Postal Service with adequate postage affixed thereon to insure its delivery.

This 8th day of October, 1999.

Respectfully submitted,

/s/ Marcia G. Shein
Marcia G. Shein
Attorney at Law
Law Office of Marcia G. Shein, P.C.
52 Executive Park South
Suite 5203
Atlanta, GA 30329
(404) 633-3797
(404) 633-7980 (Fax)

APPENDIX F

September 28, 1999

Marcia G. Shein, M.S.
Attorney at Law
52 Executive Park South
Suite #5203
Atlanta, GA 30329

RE: United States of America v. Edgar A. Garcia, Cause #97-3222

Dear Marcia,

As per our conversation this afternoon and due to our unresolvable conflict regarding the direction of my appeal and the furtherance of the issues raised in Appellant's pro-se pleadings, which you adopted and filed, and which the court denied the adoption thereof, please be advised that I do hereby instruct you to remove yourself and Richard Biggs from the record so that I may proceed pro-se with the appeal.

Sincerely,

/s/ Arnold
Edgar Garcia
Reg. #10753-017
USP-BMP, Box 26030
BEaumont, TX 77720

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 97-3222-CC

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EDGAR ARNOLD GARCIA,

Defendant-Appellant.

On Appeal from the United States District Court for the Northern District of Florida

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(Filed Sep. 15, 1999)

BEFORE: EDMONDSON and CARNES, Circuit Judges.

BY THE COURT:

Appellant's motion to adopt, construed as a motion for reconsideration, is DENIED.

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 97-3222

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EDGAR ARNOLD GARCIA,

Defendant-Appellant.

On Appeal from the United States District Court for the Northern District of Florida

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ORDER:

(Filed May 19, 1999)

Appellant's motion to append exhibits to pro se brief is denied.

/s/ J.L. Edmonds
UNITED STATES CIRCUIT JUDGE

APPENDIX I

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 97-3222

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EDGAR ARNOLD GARCIA,

Defendant-Appellant.

On Appeal from the United States District Court for the Northern District of Florida

---

ORDER:

(Filed Jul. 17, 1998)

Appellant's motion for leave to file a supplemental brief is DENIED.

/s/ J.L. Edmonds
UNITED STATES CIRCUIT JUDGE

APPENDIX J

United States District Court

Northern District of Florida at Gainesville

UNITED STATES OF AMERICA

v.

Edgar Arnold GARCIA

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

(Filed Oct. 3, 1997)

Case Number: 1:92CR01027-001

Thomas E. Miller, Gainesville, FL
Defendant's Attorney

THE DEFENDANT:

[X] pleaded guilty to count(s) I and III (on 7/25/97)
[ ] pleaded nolo contendere to count(s) _____ which was accepted by the court.

[ ] was found guilty on count(s) _____ after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 U.S.C. § 841 (b)(1)(B) & 846	Conspiracy to Possess With Intent to Distribute and Distribute Marijuana	02/28/1991	I
18 U.S.C. § 924(c)	Using and Carrying a Firearm During a Drug Trafficking Offense	02/20/1991	III

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____

[X] Count(s) II is dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 456-33-1607

Defendant's Date of Birth: 08/28/1960

Defendant's USM No.: 10753-017

Defendant's Residence Address:

Corpus Christi TX

Defendant's Mailing Address:
Unknown

Unknown NA

10/03/1997
Date of Imposition of Judgment

/s/ Maurice M. Paul
Signature of Judicial Officer
Maurice M. Paul
Senior U.S. District Judge
Name & Title of Judicial Officer

October 9, 1997
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **360 month(s)**.

Count I: 300 months.
Count III: 60 months, to run consecutive to sentence imposed in Count I.

[ ] The court makes the following recommendations to the Bureau of Prisons:

[X] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district:

[ ] at _____ a.m./p.m. on _____.
[ ] as notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

[ ] before 2 p.m. on _____.
[ ] as notified by the United States Marshal.
[ ] as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on 1-6-97 to FCC BEAUMONT USP at BEAUMONT, TX, with a certified copy of this judgment.

R.E. Holt, Warden

By Duane King, L.I.E.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 4 year(s).

Count I: 4 years
Count III: 3 years, to run concurrent with sentence imposed in Count I.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

[ ] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

[X] The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

(See additional conditions on Page 3A)

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall not possess a firearm, dangerous weapon or destructive device.

The defendant shall provide the probation officer access to any requested financial information.

The defendant shall participate in a program of drug and/or alcohol testing, treatment and counseling as deemed necessary by the probation officer.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	**$ 100.00**	**$**	**$**

[ ] If applicable, restitution amount

ordered pursuant to plea agreement.... $_____

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $ _____.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

[ ] The court determined that the defendant does not have the ability to pay interest and it is ordered that:

[ ] The interest requirement is waived.
[ ] The interest requirement is modified as follows:

RESTITUTION

[ ] The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case will be entered after such a determination.

[ ] The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	* Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Totals:	$_____	$_____	

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A [X] in full immediately; or

B [ ] $ _____ immediately, balance due (in accordance with C, D, or E); or

C [ ] not later than ____; or

D [ ] in installments to commence ____ day(s) after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E [ ] in _____ (*e.g. equal, weekly, monthly, quarterly*) installments of $ _____ over a period of ____ year(s) to commence ____ day(s) after the date of this judgment.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed. Special instructions regarding the payment of criminal monetary penalties:

[ ] Joint and Several

[ ] The defendant shall pay the cost of prosecution.

[ ] The defendant shall pay the following court cost(s):

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program are to be made as directed by the court, the probation officer, or the United States attorney.

STATEMENT OF REASONS

[ ] The court adopts the factual findings and guideline application in the presentence report.

OR

[X] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Upon motion of the government, the Court excluded the inclusion of cocaine for purposes of determining the base offense level pursuant to §2D1.1. This change did not affect the guideline computations.

Guideline Range Determined by the Court:

Total Offense Level: 34

Criminal History Category: I

Imprisonment Range: 151 to 188 months

Supervised Release Range: 4 to 5 years

Fine Range: $ 17,500.00 to $ 2,000,000.00

[X] Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: $ _____

[ ] Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

[ ] For offenses committed on or after September 13, 1994 but before April 23, 1996 that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the forseeable future under any reasonable schedule of payments.

[ ] Partial restitution is ordered for the following reason(s):

[ ] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

[X] The sentence departs from the guideline range:

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[X] for the following specific reason(s):

See Additional Reasons for Departure From the Guideline Range – Page 7

The sentence as to Count I is a departure upward pursuant to the Policy Statement contained in §5K2.1(Death). The murder of Marty Cryer was an aggravating circumstance related to the offense of conviction within the meaning of §1B1.3. The defendant traveled from Texas because a customer, Marty Cryer, did not pay for a 117 pound marijuana shipment. The defendant and David Alley, armed with firearms confronted Marty Cryer at a motel in Chiefland, Florida, where the defendant shot Marty Cryer approximately nine times, resulting in Marty Cryer's death. The victim's wife and small daughter were in an adjacent motel room at the time of the murder. The sentencing guidelines did not take into account a murder such as this in formulating §2D1.1 (Offenses Involving Drugs). Guidelines §2D1.1(a)(2) provides for an offense level of 38 where death results from the use of drugs; and §2A1.1 provides for an offense level of 43 for First Degree Murder. The Court finds, based on the facts of this case, that an upward departure to an offense level 39 is justified.

APPENDIX K

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

UNITED STATES OF AMERICA

vs.

EDGAR ARNOLD GARCIA
_____/

92-01027

INDICTMENT

(Filed July 15, 1992)

THE GRAND JURY CHARGES:

COUNT I

That between on or about January 1, 1990, and on or about February 28, 1991, in the Northern District of Florida and elsewhere, the defendant,

EDGAR ARNOLD GARCIA

did knowingly and intentionally combine, conspire, confederate and agree together with David Randall Alley, Gloria Dena Cryer, Phillip Martin Cryer and with others, to possess with the intent to distribute and to distribute marijuana, a controlled substance, in violation of Title 21, United States Code, Section 841.

All in violation of Title 21, United States Code, Section 846.

COUNT II

That between on or about December 1, 1990, and on or about December 17, 1990, in the Northern District of Florida and elsewhere, the defendant,

EDGAR ARNOLD GARCIA

did knowingly and intentionally possess with the intent to distribute marijuana, a controlled substance, in violation of Title 21, United States Code, Section 841 and Title 18, United States Code, Section 2.

COUNT III

That on or about February 20, 1991, in the Northern District of Florida, the defendant.

EDGAR ARNOLD GARCIA

during and in relation to the drug trafficking crimes for which he may be prosecuted in a court of the United States, that is, conspiracy to 'distribute and to possess with the intent to distribute marijuana, and possession with intent to distribute marijuana, as charged in Counts I and II of this Indictment, did knowingly and intentionally use and carry a firearm, in violation of Title 18, United States Code, Section 924(c) and Section 2.

A TRUE BILL:

/s/ John C. Decaro
FOREPERSON

7/15/92
DATE

/s/ Kenneth W. Sukhia
KENNETH W. SUKHIA
United States Attorney

/s/ Michael T. Simpson
MICHAEL T. SIMPSON
Assistant United States Attorney

APPENDIX L

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 97-3222-CC

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

EDGAR ARNOLD GARCIA,

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Florida

(Filed Jun. 14, 2000)

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC (Opinion ___, 11th Cir., 19___, ___F.2d___).

Before: EDMONDSON and CARNES, Circuit Judges, and WATSON,* Senior Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled

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* Honorable James L. Watson, Senior Judge, United States Court of International Trade, sitting by designation.

on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ J. L. Edmondson
UNITED STATES CIRCUIT JUDGE

ORD-42
(6/95)

APPENDIX M

U.S. Const., Amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const., Amend. VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

APPENDIX N

18 U.S.C. § 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

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18 U.S.C. § 924(c):

(1)

(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime -

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection –

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall –

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law –

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and –

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

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21 U.S.C. § 841. Prohibited acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally –

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving –

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of –

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N- (1- (2-phenylethyl) -4-piperidinyl) propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-pheny propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment

which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving –

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of –

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine,

ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N- (1- (2-phenylethyl) -4-piperidinyl) propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-pheny propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, or 1 gram of flunitrazepam, except as provided in

subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil or in the case of any controlled substance in schedule III, or 30 milligrams of flunitrazepam, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an

individual, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $100,000 if the defendant is an individual or $250,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final,

such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $200,000 if the defendant is an individual or $500,000 if the defendant is other than an individual, or both.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of title 18.

(5) Any person who violates subsection (a) of this section by cultivating a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed –

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of title 18;

(C) $500,000 if the defendant is an individual; or

(D) $1,000,000 if the defendant is other than an individual; or both.

(6) Any person who violates subsection (a) of this section, or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use –

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water, shall be fined in accordance with title 18 or imprisoned not more than five years, or both.

(7) Penalties for distribution. –

(A) In general. – Whoever, with intent to commit a crime of violence, as defined in section 16 of title 18 (including rape), against an individual, violates subsection (a) of this section by distributing a controlled substance to that individual without that individual's knowledge, shall be imprisoned not more than 20 years and fined in accordance with title 18.

(B) Definition. – For purposes of this paragraph, the term "without that individual's knowledge" means that the individual is unaware that a substance with the ability to alter that individual's ability to appraise conduct or to decline participation in or communicate unwillingness to participate in conduct is administered to the individual.

(c) Repealed. Pub. L. 98-473, title II, Sec. 224(a)(2), formerly Sec. 224(a)(6), Oct. 12, 1984, 98 Stat. 2030, as renumbered by Pub. L. 99-570, title I, Sec. 1005(a)(2), Oct. 27, 1986, 100 Stat. 3207-6

(d) Offenses involving listed chemicals

Any person who knowingly or intentionally –

(1) possesses a listed chemical with intent to manufacture a controlled substance except as authorized by this subchapter;

(2) possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that

the listed chemical will be used to manufacture a controlled substance except as authorized by this subchapter; or

(3) with the intent of causing the evasion of the recordkeeping or reporting requirements of section 830 of this title, or the regulations issued under that section, receives or distributes a reportable amount of any listed chemical in units small enough so that the making of records or filing of reports under that section is not required;

shall be fined in accordance with title 18 or imprisoned not more than 20 years in the case of a violation of paragraph (1) or (2) involving a list I chemical or not more than 10 years in the case of a violation of this subsection other than a violation of paragraph (1) or (2) involving a list I chemical, or both.

(e) Boobytraps on Federal property; penalties; "boobytrap" defined

(1) Any person who assembles, maintains, places, or causes to be placed a boobytrap on Federal property where a controlled substance is being manufactured, distributed, or dispensed shall be sentenced to a term of imprisonment for not more than 10 years and shall be fined not more than $10,000.

(2) If any person commits such a violation after 1 or more prior convictions for an offense punishable under this subsection, such person shall be sentenced to a term of imprisonment of not more than 20 years and shall be fined not more than $20,000.

(3) For the purposes of this subsection, the term "boobytrap" means any concealed or camouflaged device designed to cause bodily injury when triggered by any

action of any unsuspecting person making contact with the device. Such term includes guns, ammunition, or explosive devices attached to trip wires or other triggering mechanisms, sharpened stakes, and lines or wires with hooks attached.

(f) Ten-year injunction as additional penalty

In addition to any other applicable penalty, any person convicted of a felony violation of this section relating to the receipt, distribution, manufacture, exportation, or importation of a listed chemical may be enjoined from engaging in any transaction involving a listed chemical for not more than ten years.

(g) Wrongful distribution or possession of listed chemicals

(1) Whoever knowingly distributes a listed chemical in violation of this subchapter (other than in violation of a recordkeeping or reporting requirement of section 830 of this title) shall be fined under title 18 or imprisoned not more than 5 years, or both.

(2) Whoever possesses any listed chemical, with knowledge that the recordkeeping or reporting requirements of section 830 of this title have not been adhered to, if, after such knowledge is acquired, such person does not take immediate steps to remedy the violation shall be fined under title 18 or imprisoned not more than one year, or both.

21 U.S.C. § 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

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28 U.S.C. § 2106. Determination

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Federal Rules of Criminal Procedure

Rule 52. Harmless Error and Plain Error

(a) Harmless Error.

Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error

Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

Federal Rules of Criminal Procedure 12(b)(2)

(2) Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings); or

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APPENDIX O

No. 00-463

In the Supreme Court of the United States

EDGAR ARNOLD GARCIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

* * *

[6] state [Canada] may be considered." Pet. App. 3a-4a. The court found that the doctrine of specialty, as applied by United States courts, was not violated by the sentencing approach taken by the district court, relying on cases establishing that an indictment may be amended after extradition to increase the drug quantity involved and that a court may admit evidence of non-extradited offenses at a trial on extradited offenses. *Id.* at 4a-5a. The court concluded that the doctrine of speciality "does not restrict the scope of proof of other crimes that may be considered in the sentencing process." *Id.* at 5a.[1]

[1] The court of appeals also rejected petitioner's claims – not reasserted here – that the district court erred in enhancing his offense level for obstruction of justice and in denying acceptance of responsibility credit. Pet. App. 5a-8a.

DISCUSSION

1. Petitioner contends (Pet. 22-23), for the first time in this Court, that the 360-month sentence on the drug count was imposed in violation of this Court's decision in *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000), because the indictment did not allege the quantity of drugs involved in his offense. In *Apprendi*, the Court held that, as a matter of constitutional law, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 2362-2363.

Petitioner was convicted of a drug offense that was subject to sentencing in accordance with the graduated penalties set forth in 21 U.S.C. 841(b). Petitioner's 360-month sentence is authorized by Section 841(b)(1)(B), which provides that, where the offense involves a particular threshold quantity of a controlled substance [7] (here, 100 kilgrams or more of marijuana), the defendant shall be sentenced to a term of imprisonment "which may not be less than 5 years and not more than 40 years." 21 U.S.C. 841(b)(1)(B) (1994 & Supp. IV 1998). Petitioner's sentence is not authorized, however, by Section 841(b)(1)(D), which provides a term of imprisonment of "not more than 5 years" for a drug offense involving any quantity of marijuana up to 50 kilograms. Thus, the sentence imposed on petitioner for possession of a controlled substance with intent to distribute it depended on an increase in the statutory maximum sentence by virtue of a fact (*i.e.*, that the offense involved more than 100 kilgrams of marijuana) that was not alleged in the indictment.

In *Apprendi*, this Court stated that "when the term 'sentence enhancement' is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict." 120 S. Ct. at 2365 n.19. Although this case involves a guilty plea rather than a jury verdict,[2] and *Apprendi* did not decide whether facts that enhance a statutory maximum sentence must be charged in the indictment,[3] the court of appeals should be afforded the opportunity in the first instance to determine whether imposition of a sentence above five years in this case on [8] the basis of a drug quantity not alleged in the indictment is error under the rationale of *Apprendi*.

We note that, even assuming error in this case, petitioner is not automatically entitled to resentencing to a prison term of "not more than 5 years" pursuant to 21 U.S.C. 841(b)(1)(D) (1994 & Supp. IV 1998). He has never disputed, and does not now dispute, his responsibility for at least 100 kilograms of marijuana. To the contrary, petitioner's plea agreement specifically recited that petitioner was exposed to up to 40 years' imprisonment for the marijuana conspiracy charge under 21 U.S.C. 841(b)(1)(B) (1994 & Supp. IV 1998). Gov't C.A. Br. 6-7. Moreover, at

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[2] *Apprendi* itself also involved a guilty plea to underlying offenses, followed by a penalty enhancement proceeding. See *Apprendi*, 120 S. Ct. at 2352.

[3] *Apprendi*, which involved a challenge to a state conviction, did not present any issue concerning whether a particular fact should have been alleged in an indictment. See *Apprendi*, 120 S. Ct. at 2355 n.3.

the plea hearing, petitioner acknowledged that the government could present evidence showing that the drug conspiracy entailed far more than the 100 kilogram threshold to invoke that penalty provision. *Id.* at 7. Petitioner has not sought, and does not now seek, dismissal of the indictment as defective. The appropriate disposition of this petition is therefore vacatur of the court of appeals' judgment and remand of the case for further consideration in light of *Apprendi* and plain error analysis. See *Johnson v. United States*, 520 U.S. 461 (1997).

2. Petitioner also argues (Pet. 8-23) that the district court's upward departure from the indicated sentence under the Sentencing Guidelines because of his murder of Cryer and the district court's use of a Guidelines range determined in part on the quantity of drugs attributed to petitioner violated *Apprendi*.

Contrary to petitioner's arguments (Pet. 20-21), there was no error under *Apprendi* in the application to petitioner of the Sentencing Guidelines. This Court has upheld the use and operation of the Sentencing Guidelines, see *Mistretta v. United States*, 488 U.S. 361 (1989), and has made clear that so long as the statutory

* * *

APPENDIX P

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

United States of America, Plaintiff/Appellee, v. Edgar Arnold Garcia, Defendant/Appellant.	ECCA #97-3222 **Petition for En Banc Determination as per FRAP Rule 35**

PETITION FOR HEARING EN BANC

COMES NOW, Defendant/Appellant/Petitioner, Edgar Garcia, and respectfully seeks this Honorable Court grant Petitioner a **Hearing En Banc.**

Petitioner brings to this Honorable Court's attention errors in the Panel's determination of the facts of this case and the sufficiency of the evidence, and; a Panel opinion that is in direct conflict with precedent of the Supreme Court and in conflict with other circuits as follows:

The Panel's decision that the "doctrine of specialty be resolved in accordance with the law and position of the U.S." is in opposition to ***United States v. LeBarron,* 156 F.3d 621, 622 (5th Cir. 1998)** which states that the "Appropriate test for violation of doctrine of specialty is whether extraditing country would consider acts for which defendant was prosecuted as independent from those for which he or she was extridited." [sic]

The Panel erroneously declares "Canada was well aware of the additional conduct ascribed to defendant and has acquiesced to the procedure by which such conduct is considered in sentencing." Canada was never apprised that the defendant would be sentenced for murder and the Louisiana dealings in his Florida marijuana case nor did the Canadian government acquiesce to the procedure. The evidence tendered by the prosecution as the Canadian government's acquiesce was an informal letter from the Defendant's Canadian adversary in the adversarial process (see, affidavit, Attorney Wes Wilson, Exhibit G, Appellant's Motion to Append Exhibits).

The Canadian government has been approached regarding their position on the method of sentencing in this case and has not yet provided their response (Appeal Brief, at p. 16). However, notwithstanding the above the Panel applied an erroneous standard to the "Specialty" issue stating that "The distinction is thus drawn between proof of other crimes as a matter germane to the determination of punishment for the extradited crime and proof of other crimes in order to exact punishment for those other crimes. Only the latter course is forbidden by the doctrine of specialty." In essence the Panel ruled that the murder and Louisiana dealings were germane to the Florida marijuana case and not proof of other crimes in order to exact punishment for those other crimes. This position is in conflict with American and Appellate Jurisprudence as follows:

* * *

In *Jones v. United States*, U.S. ___, 143 L.Ed 2d 311 (1999), serious bodily injury, an element of the offense

was not pled in the indictment. The Supreme Court reversed and remanded. In the case at bar the murder and Louisiana dealings were not merely unpled elements but rather are separate offenses which were not indicted and which the defendant did not plead guilty to.

In ***Almendarez-Torres v. United States*, 523 U.S. ___, 140 L.Ed 2d 350 (1998)** the Court clarified that "An indictment concerning a federal statutory offense must set forth each element of the crime that it charges, but the indictment need not set forth factors relevant to only the sentencing of an offender found guilty of the charged crime." The Supreme Court stated that cases involving recidivism called for "higher sentences for recidivists" as setting forth sentencing factors, not as creating new crimes, ("at least where the conduct, in the absence of recidivism, is independently unlawful."). In the case at bar not only was the murder independently unlawful but was charged (and still pending) independently by the State of Florida at the time of Defendant's sentencing.

It cannot be claimed that the murder departure (approximately 15 years) does not fall within the scope of ***Jones*** and ***Almendarez-Torres*** for lack of the departure exceeding the statutory maximum of the substantive offense. "In ***Almendarez-Torres***. . . . The Court identified a set of factors, drawn from ***McMillan v. Pennsylvania*, 477 U.S. 79, 87-90, 91 L.Ed. 2d 67 (1986)**, that would govern the assessment of a claim that the Due Process Clause requires an ostensible sentencing factor to be treated as a substantive element of an offense. The ***McMillan*** factors include: . . . and (5) that the statute give [sic] no impression of having been tailored to permit the sentencing enhancement to be a tail which wags the

dog of the substantive offense, but, to the contrary, simply took one factor that has always been considered by sentencing courts to bear on punishment and dictated the precise weight to be given that factor. *Id.*, **118 S.Ct at 1230.**" ***United States v. Favors*, 54 F.Supp 2d 1328, 1330 (N.D.Ga. 1999).** In the case at bar the State charged murder clearly is the tail that wags the dog of the substantive offense because murder is by no means a factor considered by sentencing courts to dictate the precise weight to be given that factor, but rather, a separate indictable crime, unlike with recidivism and drug weights which are sentencing factors. In the case at bar the murder does exactly what ***Almendarez-Torres*** forbids by tailoring the statute via the guidelines to permit the departure to be a "tail which wags the dog of the substantive offense."

In ***United States v. Allen*, 190 F.3d 1208 (11th Cir. 1999)** an inmate with prohibited objects contested his sentence which was based on the determination that the objects were "intended to be used as weapons." Citing to ***McMillan***, ***Almendarez-Torres***, and ***Jones*** this court concluded that to consider that the objects were "intended to be used as weapons" as a sentencing factor rather than a pled element would substantially elevate the punishment from no more than 6 months to potentially 5 years in prison. This court vacated and remanded. In the case at bar the departure increase of approximately 15 years likewise "substantially elevates" the punishment and warrants vacation and remand for resentencing.

In ***United States v. Davis*, 184 F.3d 366 (4th Cir. 1999)** the defendant pled guilty to failure to stop. The indictment failed to allege great bodily injury (an element)

resulted. The 4th Circuit relying on ***Jones*** and ***Almendarez-Torres*** vacated and remanded because the indictment did not allege bodily injury. In the case at bar not only did the government fail to allege murder in the indictment but the government knew well enough that the murder was a separate offense charged and pending in another jurisdiction (the State of Florida) at the time of the proceedings in this case.

* * *

The Panel also erred in its determination of the facts resulting in this misapplication of the guidelines:

The Panel affirmed an enhancement for obstruction of justice based on events that did not take place i.e., that the appellant "asked his secretary to go to his apartment to remove money and cocaine and burn handwritten financial records, photographs of a man and a map showing locations in Florida. The . . . photographs understood by the secretary to be of Cryer and a map understood by her to relate to his location." (Panel opinion, pp. 7-8).

Defendant's attorney, unable to locate the secretary (and other witnesses), advised Defendant to plead guilty and sign a largely untrue factual basis for plea, the plea itself a product of bad/incorrect legal advice, false promises apart from the plea agreement, and threats and coercion (see, Appellant's Supplemental Appeal Brief).

Appellate counsel of record obtained and attached to Appellant's Reply Brief to the government's Answer Brief, and affidavit from the secretary clarifying that: no

money and drugs (cocaine) were removed from Defendant's apartment or office, no financial records or ledgers (handwritten or not) were at Defendant's apartment or office when she attended thus none were removed and burned, and only one photo of an unidentified man and one new and unused map with no markings or locations were removed from the Defendant's office (not his apartment) and disposed of in a dumpster.

The Panel's error in this regard (the reliance on untrue/materially false facts) caused an affirmation of a misapplication of the guidelines which should be noticed and corrected on direct appeal by this court. **See, *United States v. Leonard*, 157 F.3d 343, 345 (5th Cir. 1998)** and citing to ***United States v. Aderholt*, 87 F.3d 740 (5th Cir. 1996)**.

In ***Aderholt*** the defendant was convicted of mail fraud and aiding and abetting. The district court misapplied the guidelines and departed upward for murder. The government conceded that the defendant could not have been convicted in federal court for conspiracy to commit murder because the "murder is a State offense." ***Id.*, at 744**. Thus the 5th Circuit determined that the district court erred in applying the guidelines, prejudicing the defendant, and stated that "absent an upward departure, he would have received a lesser sentence." ***Id.*, at 744**. In the case at bar absent the misapplied guidelines – the obstruction enhancement and murder departure – the Appellant would also have received a lesser sentence.

In ***United States v. Williamson*, 183 F.3d 458, 462 (5th Cir. 1999)** the court stated that "**Section 2255** motions may raise only constitutional errors and other injuries

that could not have been raised on direct appeal. . . . Misapplications of the Sentencing Guidelines fall into neither category and hence are not cognizable in §2255 motions." In the case at bar this court should, by law, hear this issue, and vacate and remand to the district court for an evidentiary hearing on disputed facts and for resentencing with a correct application of the guidelines.

* * *

The Panel erroneously concluded that the Defendant's plea did not warrant a reduction for acceptance of responsibility because of his "avoidance of responsibility from the start to near finish" citing the erroneous findings, "destruction of evidence and a frivolous claim in Canada that he was subject to a federal death penalty. . . . " What the Panel failed to consider is that the Defendant attempted to plead guilty even prior to flight (see, Defendant's sentencing memorandum, at p. 36) and continued up to his surrender. The extradition delays were a direct result of the Assistant U.S. Attorney's failure to negotiate in good faith and/or to issue a statement that the Defendant would not be punished for murder in his marijuana case (albeit the likely punishment contemplated was the death penalty). This concern largely developed from the Appellant's various Canadian lawyers who feared, from the lack of the AUSA's participation in the negotiation process, that the "Doctrine of Specialty" would be violated upon Appellant's surrender (see, affidavit, Attorney Wes Wilson, Exhibit G, Appellant's Motion to Append Exhibits). The reason the government never responded to Appellant's Canadian death penalty allegations was because unbeknownst to Appellant and the Canadian Courts the AUSA had along [sic] intended

to seek punishment for the State murder in Appellant's federal marijuana case by way of seeking a departure. The denial of acceptance of responsibility should not be affirmed in this case.

PRAYER

Considering the aforementioned Petitioner humbly prays this Honorable Court grant Petitioner's request for a **Hearing En Banc** to ensure the "fairness, integrity and public reputation of judicial proceedings" so as to not "undermine the rule of law." ***Williamson*, supra, at 464** (citing to ***Aderholt***).

/s/ Edgar Arnold Garcia
Edgar Arnold Garcia
Defendant/Appellant/Petitioner
Reg. #10753-017
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Beaumont, TX 77720

APPENDIX Q

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 97-3222

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

v.

EDGAR ARNOLD GARCIA,

Defendant/Appellant.

APPEAL FROM A CRIMINAL
CONVICTION FROM THE UNITED STATES
DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

CORRECTED BRIEF OF APPELLANT

EDGAR ARNOLD GARCIA

---

* * *

[9] accepting responsibility for the federal charges, and relevant conduct, through the signing of the government's "factual basis for plea", there was no proper reason to deny the reduction.

ARGUMENTS AND CITATIONS OF AUTHORITY

ISSUE I

WHETHER APPELLANT'S ULTIMATE SENTENCE WAS BASED, IN PART, ON

OFFENSES WHICH WERE NEITHER CHARGED NOR SET OUT IN THE EXTRADITION DOCUMENTS, THEREBY VIOLATING THE DOCTRINES OF SPECIALTY AND DUEL CRIMINALITY AS RECOGNIZED IN THE TREATY BETWEEN THE UNITED STATES AND CANADA.

Argument

As set out in the above facts, Appellant, both in presentencing pleadings, and at the sentencing hearing, argued against the application of certain sentencing factors, as said factors were alleged to have been violative of the Extradition Treaty that exists between the United States and Canada. As the district court found such arguments to be unpersuasive, Appellant respectfully challenges the district court's findings on this issue.

[10] First, Appellant asserts that, according to the Eleventh Circuit's holding in *United States v. Puentes*, 50 F.3d 1567, 1575 (11th Cir. 1995), he has proper standing to raise this issue to this Honorable Court at this time.

Appellant's extradition from Canada was requested by the United States through Diplomatic Note 219 [R1: 30: exhibit 1J. In said Diplomatic Note, the Canadian Government was informed that Appellant was facing (I) drug and weapon charges by the federal government; and (ii) a murder charge out of the State of Florida. In the Warrant of Committal, issued by Canadian Justice Jarvis, the offenses from each of the two jurisdictions were distinguished [R1: 30: exhibit 10).

Article 12 of the Extradition Treaty [R1: 30: exhibit 2] sets forth that "a person extradited, under the present

Treaty, shall not be detained, tried, or punished, in the territory of the requesting State, for an offense other than that for which extradition has been granted. . . . "

As Appellant pleaded guilty to the federal charges separately from the plea of guilty to Second Degree Murder in Florida, it is asserted that the sentence imposed by the district court was in violation of Extradition Treaty. The basis for this position is that, the use of uncharged conduct, for punishment in the federal case, was violative of the "specialty doctrine". This "specialty doctrine", based on Article 12, stands for the proposition that the United States cannot prosecute or [11] punish an extradited individual for offenses other than those which are specifically listed in the extradition request. *See United States v. Rausher*, 119 U.S. 407 (1886); *United States v. Gallo-Chamorro*, 48 F.3d 502, 506 (11th Cir. 1995); *United States v. Alvarez-Moreno*, 874 F.2d 1402, 1413 n.10 (11th Cir. 1989). The objective of such a "doctrine" was said to "insure that the treaty is faithfully observed by the contracting parties." *United States v. Diwan*, 864 F.2d 715, 721 (11th Cir..), *cert denied*, 492 U.S. 921 (1989).

To determine whether the defendant is being prosecuted or punished for an offense, other than what was the basis for extradition, the courts must consider "whether the surrendering state would regard the prosecution an issue as a breach [of the Treaty]." *United States v. Jetter*, 722 F.2d 371, 373 (8th Cir. 1983). The punishment for such a "separate" offense, not included in the extradition request, would also constitute a breach of the Treaty.

"The doctrine of specialty requires a correspondence between the charges contained in the indictment, and the

facts presented to the [requested country's authorities]. *United States v. Sensi*, 879 F.2d 888, 895 (D.C. Cir. 1989). What this requires is that "the prosecution be based on the same facts as those set forth in the request for extradition." *Id.*, at 895-96 (citation and internal quotation marks [12] omitted). "Thus, the test focuses on the evidentiary material that was submitted to the [requested country's] magistrate." *Id.*, at 896.

It is submitted that the use of uncharged offenses, in order to dramatically increase the defendant's sentence, would constitute, in the requested state, punishment for a completely different offense, than that which the extradition was based. This would clearly violate the "specialty doctrine". *See United States v. Miro*, 29 F.3d 194, 200 (5th Cir. 1994)("We may assume, arguendo, that increasing a sentence to compensate for unextradited crimes might, under proper circumstances, be a deviation from a legal rule, such that it would constitute error").

In the case at bar, Appellant had his sentence increased due to the inclusion of relevant conduct (*i.e.*, additional drug amounts said to have gone from Texas to Louisiana, and the use of the Florida murder as a basis for an upward departure). While the Sentencing Guidelines allow the use of such relevant conduct, which may include uncharged conduct, under Canadian criminal law, there is no such provision. As set out by the Affidavit from Appellant's expert on Canadian law [R1: 30: exhibit 5], one may not be punished on the basis of conduct for which the person has not been charged, tried, and duly convicted.

As Diplomatic Note 219 makes clear, the United States was requesting extradition based on the federal charges involving marijuana distribution and use of [13] a firearm in relationship to "the importation of marijuana to Texas and Florida". In reviewing the extradition request, Canadian officials relied on Diplomatic Note 219, as well as evidentiary packets pertaining to both the federal charges and the charges from Florida. Throughout the proceedings, the Canadian officials kept the federal and state charges separate. In fact, as to the federal charges against Appellant, it was stated that:

> "Mr. Garcia is also alleged to have been involved in the interstate transportation of marijuana from Texas to Florida at the fifty to one hundred kilogram transaction level, and, to have used a firearm in furtherance of this drug trafficking activity. "

[RI: 30: exhibit 4].

As such, the extradition was based on the belief that the only punishment facing Appellant, in federal court, was for the Texas-to-Florida marijuana activity, and the connected § 924(c) charge. Appellant asserts that the inclusion of Texas-to-Louisiana drug activity violates the Canadian beliefs, as said activity constitutes a separate conspiracy and was never mentioned to the Canadian officials.

In support of this position, Appellant cites to *United States v. LaFraugh*, 893 F.2d 314, 317-18 (11th Cir. 1990), where this Court held that "if there is an overall agreement among the various parties to perform different functions in order to carry [14] out the objectives of the conspiracy, then it is one conspiracy." (citations omitted).

Furthermore, in *United States v. Maxwell*, 34 F.3d 1006, 1010 (11th Cir. 1994), it was stated that " when illegal conduct does exist in 'discreet, identifiable units, apart from the offense of conviction, the Guidelines anticipate a separate charge for such conduct." (citations omitted). The *Maxwell* Court went on to find that separate drug sales, that involved different parties and were "temporally remote", were not part of the same course of conduct or common scheme. *Id.*

In Appellant's case, the Texas-to-Louisiana activity cannot be said to be part of the Texas-to-Florida scheme. The agreements that existed between the parties in each location were clearly "discreet, identifiable units". As stated in *Maxwell*, "the two offenses appear to be 'isolated, unrelated events that happen only to be similar in kind. ' " *Maxwell*, 34 F.3d at 1011.

The two activities are geographically and temporarily isolated and unrelated. Appellant had separate agreements with different buyers in each of the states. The activity in Louisiana was also said to have taken place prior to the activity with the buyer in Florida. The only overlap in the two activities was the involvement of David Alley.

More importantly, the parties in Louisiana did not know of the existence of the parties in Florida, and vice-versa. The two separate buyers had no personal [15] interest in the success of the sales to one another and, as such, neither activity furthered any overall organizational plan to which they were all participating. This does not meet the test set forth in *LaFraugh*.

As the Texas-to-Louisiana activity was completely separate from the Texas-to-Florida activity, thus amounting to a separate conspiracy, and the Canadian officials were not given information regarding the activity in Louisiana, the drug amounts attributable to the Louisiana activity, as well as the additional punishment by the inclusion of said amounts, constitutes punishment outside of the extradition agreement and is prohibited by Article 12 of the Treaty. As such, Appellant respectfully requests that this Honorable Court vacate the sentence and remand the case for resentencing.

Appellant also challenges the use of the Florida murder as a basis for imposition of an upward departure. Again, throughout the extradition proceedings, the Canadian officials treated the federal charges separate from the Florida charge. The extradition request did not mention any potential punishment in the federal court for the murder, and the Canadian officials found that no punishment for the murder would be imposed upon Appellant in the federal court.

Also, as mentioned above, the Canadian Courts do not recognize "relevant conduct" and, as such, it is doubtful that the extraditing court ever considered that [16] the United States would punish Appellant for the murder without charging him with such conduct.

Furthermore, while the doctrine of "dual sovereignty" allows a defendant to be prosecuted and punished for the same acts in federal and state courts, there is no such provision in Canadian law, as it prohibits punishment for the same offense in Canadian federal and provincial courts [R1: 30: exhibit 5]. Since it would be illegal

in Canada to so punish an individual, it is asserted that the extraditing officials never contemplated that the United States would punish Appellant for the same act that the Florida courts would impose punishment.

The Canadian officials believed Appellant would only be punished for the murder in the State court. In fact, at the time of sentencing, Appellant had pleaded guilty to the Florida murder and was sentenced to seventeen years. To allow the double punishment to stand would be contrary to the understandings of the extradition agreement and be violative of the doctrine of specialty. As such, it is respectfully requested that this Honorable Court vacate the sentence, as imposed, and remand for resentencing.

Appellant has also advised undersigned counsel that he has submitted the above arguments to the Courts of Canada. As such, Appellant would respectfully request that this Honorable Court stay its decision making process pending the [17] Canadian Government's position as to whether or not it believes that Article 12 of the treaty was violated.

ISSUE II

WHETHER THE DISTRICT COURT CLEARLY ERRED IN FINDING THAT A TWO-POINT ADJUSTMENT FOR OBSTRUCTION OF JUSTICE WAS WARRANTED.

Argument

As set out in the facts above, both the government and the Presentence Report asserted that Appellant should be subjected to a two-point enhancement to the

offense level, under U.S.S.G. § 3C1.1, for the obstruction of justice. Such positions were based on the conclusions that (1) Appellant buried the firearm used to commit the murder of Cryer; (ii) Appellant directed Monica Poole to destroy documents, and remove drugs from Appellant's apartment; and (iii) Appellant fled to Canada, where he lived under an assumed name.

During the sentencing hearing, and after considering the arguments made on this issue, the district court overruled Appellant's objection, and found that the enhancement was warranted. Specifically, the district court stated "[i]t is very clear to this court beyond a reasonable doubt this defendant did obstruct and attempt to obstruct justice by all of the activities following the murder . . . The position

* * *

APPENDIX R

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 97-3222

UNITED STATES OF AMERICA,
Plaintiff/Appellee,

v.

EDGAR ARNOLD GARCIA,
Defendant/Appellant.

APPEAL FROM A CRIMINAL CONVICTION FROM
THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

REPLY BRIEF OF APPELLANT EDGAR ARNOLD GARCIA

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[1] *ARGUMENTS AND CITATIONS OF AUTHORITY*

ISSUE I

APPELLANT'S SENTENCE WAS BASED, IN PART, ON OFFENSES WHICH WERE NEITHER CHARGED NOR SET OUT IN THE EXTRADITION DOCUMENTS, THEREBY VIOLATING THE DOCTRINES OF SPECIALTY AND DUEL CRIMINALITY AS RECOGNIZED IN THE TREATY BETWEEN THE UNITED STATES AND CANADA.

Response to Government's Argument [Appellee Brief: 22-34]

According to Article 12(a) of the Extradition Treaty between Canada and the United States, "a person extradited, under the present Treaty, shall not be detained, tried, or ***punished***, in the territory of the requesting State, for an offense other than that for which extradition has been Granted. . . . " (emphasis supplied).

Appellant has asserted that the use of the drug amounts from Texas to Louisiana[1] as "relevant conduct", along with using the murder of Cryer as a basis for an upward departure, were in violation of the Extradition Treaty.

[2] As previously submitted, through Diplomatic Note 219, the Canadian Government was informed that Appellant was facing (i) drug and weapon charges in Federal Court; and (ii) a murder charge out of the State Court of Florida. Furthermore, according to the Warrant of Committal [Attachment A], the offenses from each of the two jurisdictions were clearly distinguished from one another.

As to the Texas-to-Louisiana activity, this was completely separate from the Texas-to-Florida activity, thus amounting to a separate conspiracy, as set out previously. The Canadian officials were also not given information regarding the activity in Louisiana. The extradition, however, was based on the belief that the only punishment facing Appellant, in federal court, was for the Texas-to-

---

[1] Marijuana dealings which the government states "may have been outside the charged conspiracy" [Appellee Brief: 22].

Florida marijuana activity, and the connected § 924(c) charge. As such, Appellant asserts that the inclusion of Texas-to-Louisiana drug activity violates the Canadian beliefs, as said activity constitutes a separate conspiracy and was never mentioned to the Canadian officials. Also, under Canadian criminal law, there is no provision for the use of "relevant conduct" [Rl: 30: exhibit 5]. As one may not be punished on the basis of conduct for which the person has not been charged, tried, and duly convicted, it is doubtful that the extraditing court ever considered that the United States would punish Appellant for the unrelated drug activity without charging him with such conduct. Therefore, the drug amounts attributable to the Louisiana [3] activity, as well as the additional punishment by the inclusion of said amounts, constitutes punishment outside of the extradition agreement and should have been prohibited by Article 12 of the Treaty.

As to the use of the Florida murder as a basis for imposition of an upward departure, the extradition request did not mention any potential punishment in the federal court for the murder. Furthermore, Canadian law does not recognize the doctrine of "dual sovereignty" which allows a defendant to be prosecuted and punished for the same acts in federal and state courts [R1: 30: exhibit 5]. Since it would be illegal in Canada to so punish an individual, it is asserted that the extraditing officials never contemplated that the United States would punish Appellant for the same act that the Florida courts would impose punishment.

As Appellant pleaded guilty to the federal charges separately from the Florida charges, and the "specialty doctrine" stands for the proposition that the United

States cannot prosecute or punish an extradited individual for offenses other than those which are specifically listed in the extradition request, *see* ***United States v. Rausher,*** 119 U.S. 407 (1886); ***United States v. Gallo-Chamorro,*** 48 F.3d 502, 506 (11th Cir. 1995); ***United States v. Alvarez-Moreno,*** 874 F.2d 1402, 1413 n.10 (11th Cir. 1989), said doctrine was clearly violated in this case.

[4] The government has also set the opinion of an individual from the International Assistance Group within the Canadian Department of Justice, which stated that the government's intention to go beyond the sentencing guidelines was not violative of the Treaty. Contrary to the government position that such a statement is dispositive of this issue, Appellant offers that it is nothing more than an opinion. As such, and given that no credentials of this person have been offered, there is no reason to take, at face value, said opinion over the conclusions reached by Appellant's expert on extradition matters. Given the two diverse positions, offered by two allegedly knowledgeable individuals, Appellant asserts that the ultimate decision should come from the Canadian officials themselves.

Given the argument originally submitted, along with those above, Appellant respectfully renews his request that this Honorable Court vacate the sentence, and remand for resentencing. It is also requested that a short stay in the decision-making process be granted so as to allow the Canadian Government's position, as to whether or not it believes that Article 12 of the treaty was violated, to be submitted.

* * *

APPENDIX S

Clerk of the Court (ECCA) June 11, 2000
Atlanta, Georgia 30303

Re: Consideration of Intervening and New Developments in, *United States of America v. Edgar Arnold Garcia*, ECCA #97-3222, as per FRAP 28(j).

Dear Clerk:

As per **FRAP 28, I.O.P. #6**, please file and bring to the Court's attention the following citation and comments for consideration in Petitioner's request for **En Banc Consideration.**

***Castillo v. United States*, Supreme Court #99-658 (June 5, 2000)**

Petitioner submits that the rationale in ***Castillo*** is relevant to the issue at bar because the Petitioner did not plead guilty to murder in this case and because the district judge should not have treated the murder as a sentencing factor. As such, Petitioner humbly requests the Court consider the following:

In ***Castillo***, the Supreme Court again decided "whether words in a federal criminal statute create offense elements (determined by a jury) or sentencing factors (determined by a judge)." The Court citing to ***Jones*** and ***Almendarez-Torres***.

The ***Castillo*** Court reversed and remanded a reimposed 30 year mandatory sentence for an unpled "machinegun" in a **924(c)** case. The Court relying on ***Jones*** and ***Almendarez-Torres*** concluded that the relevant statutory words "created a separate substantive crime" and not a sentencing factor, noting "that the difference

between the act of using or carring [sic] a 'firearm' and the act of using or carrying a 'machinegun' is both substantive and substantial – a conclusion that supports a 'separate crime' interpretation."

In the case at bar Petitioner raised the same ***Jones*** and ***Almendarez-Torres*** rationale (see, Petition for Hearing En Banc, pp. 2-4), which discusses that a fact that increases the maximum permissive sentence (the 3rd ***McMillan*** factor) violates due process but not in the case of recidivism. . . . Here, your Petitioner asked the Court to rely on the 5th ***McMillan*** factor in considering Petitioner's due process violation claim for lack of the unpled conduct (the murder departure) exceeding the statutory maximum (see, Petition for Hearing En Banc, p. 3).

However, the ***Castillo*** Court illustrates that the unpled element or fact need not exceed the statutory maxium to violate due process and distinguishes between the statutory language of a "basic federal offense" and language that refers "directly to sentencing."

In the case at bar not only is the murder an unpled element but the statute itself [does not] contain the language "murder" at all. The uncharged murder is clearly a separate offense not just meeting but exceeding the "separate crime" standard set forth in ***Castillo***.

Sincerely,

/s/ Edgar A. Garcia
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Reg. #10753-017
Petitioner/Pro-Se
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cc. Michael Simpson, US Attorney
Honorable Joseph W. Hatchett
Honorable Gerald B. Tjoflat
Honorable R. L. Anderson, III
Honorable J. L. Edmondson
Honorable Rosemary Barkett
Honorable S. F. Birch, Jr.
Honorable Joel F. Dubina
Honorable Susan H. Black
Honorable Ed. E. Carnes
Honorable Stanley Marcus
Honorable Emmett R. Cox
Honorable Frank M. Hull

APPENDIX T

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff/Appellee, vs. EDGAR ARNOLD GARCIA, Defendant/Appellant.	CASE NO. 97-3222

MOTION TO ADOPT SUPPLEMENTAL PRO SE PLEADINGS

* * *

[38] Small amounts of marijuana and methamphetamine were also removed. Poole gave the money to Garcia's girlfriend, Kathy Ticer. Garcia also had Poole destroy photographs of Marty Cryer and a map showing locations in Florida.

Petitioner objected, the Court overruled. Petitioner submits that had the District con ucted an evidentiary hearing that the District would have discovered that Garcia asked Poole to empty his apartment and give his belongings to Ticer, the mother of his daughters, and that; Poole chose a friend to help her move furniture, and that; no mention was made in Garcia's request about money or drugs and that no drugs or money or drugs were in the apartment, and that, therefore, none were removed, with the exception of a marijuana cigarette which Poole kept,

and that; Garcia requested that Poole remove from Garcia's office one photograph of an unidentified male and a map which was new and unused that contained no markings, locations or directions.

* * *

8) Probation's PSR at 19 states that " . . . Garcia was the source of supply for the Cryer-Ash organization. . . . "

Petitioner objected, the court overruled. Petitioner submits that had the District conducted an evidentiary hearing that the District would have discovered that Garcia was but one source of marijuana for the Cryer-Ash organization who was not the source at all but rather the middle man for the supplier Bennito Silva, Jr., and that; the Cryer-Ash organization conspired in marijuana with other sources prior to and after Garcia's involvement.

* * *

[39] 9) Probation's PSR at 20 states drug weight amounts that are unconfirmed and unreliable and that "the defendant's source of supply, Bennito Silva, Jr., indicated that the defendant obtained about 1,000 pounds of marijuana from him and additional quantities from his uncle Jesse Escobar. Garcia's girlfriend, Kathy Ticer, has indicated she saw the defendant with as much as one kilogram of cocaine at one time. However, according to Sliva, the defendant also obtained cocaine from him, including several quarter kilograms.

Petitioner objected, the Court overruled. Petitioner submits that had the District conducted an evidentiary hearing that the District would have discovered from

previous relevant proceedings that Silva denied knowledge of the Garcia/Cryer marijuana debt, denied sending Astrala to Florida to collect, denied harboring and providing for the Defendant and Alley at his ranch in Orange Grove, Texas, denied having immediate knowledge of the murder subsequent to the murder, and falsely implicated that Garcia had drugs [sic] dealings with his uncle Jessie who Silva testified on in another case. The district would have also discovered that IRS agents Kathy Hubble and Rene Amaya testified under oath in other proceedings that Silva harbored and provided for Garcia and Alley for some six to eight weeks after the murder and that the money owed Garcia from Cryer belonged to Silva and that Silva knew about the murder while hiding the Defendants.

Petitioner also submits that the District would have discovered from a cross examination of Ticer that she never saw a kilo of cocaine in Garcia's possession and that she has misled different courts [40] in different proceedings to further her own needs and to avoid prosecution, and that the authorities improperly harrassed and threatened to prosecute her for non-existent crimes, illtreated and abused her in the case at bar against Garcia even to the point of the authorities providing her narcotics to induce and/or promote a relapse in her long fought [sic] for sobriety as to break her will knowing that in desperation she would say anything desired by the authorities, and sexually harrassed her taking advantage of her vulnerability.

* * *

Petitioner submits that the above claims as to what the district would have discovered had the District conducted an evidentiary hearing would have been supported by:

1) Disclosure of FDLE (law enforement [sic]) records.

2) Disclosure of Chiefland Police records.

3) Disclosure of Texas DPS records.

4) Cross examination of law enforcement agents and officers.

5) Court transcripts of other proceedings relevant to the case at bar.

6) Disclosure of telephone records of Alley and Ash.

7) Cross examination of Nanay Cryer, Gloria Cryer, Lola Ash, David Alley and Astrala, and/or the taking of affidavits such as the ones submitted as exhibits herein.

Petitioner submits that as a result of the incorrect fact finding in the case at bar that Probation's PSR drug calculations at 21 are unsubstantiated; that the factors considered for obstruction at 23 are untrue; that the adjustment for acceptance of responsibility at 24 and 32 are incomplete; that the base offense level at 26 is not accurate; that the adjustment for role in the offense at 29 is in-

* * *

APPENDIX U

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

UNITED STATES OF AMERICA

vs.

EDGAR ARNOLD GARCIA
----------/

GCR 92-~~01042~~
1047 MMP

IN CAMERA

DEFENDANT'S SENTENCING MEMORANDUM

* * *

[23] separate and unrelated transactions that did not involve one "large project."

In sum, it would be surprising to the Canadian government and the courts and other officials that reviewed the extradition request to learn that the federal government now proposes to punish Mr. Garcia for alleged importation of marijuana to Louisiana since in the five years that Mr. Garcia's case was pending in the Canadian courts the United States government never mentioned any allegations in connection with the State of Louisiana. The same is true for the cocaine charges; not once in five years did the United States government ever mention any allegations of cocaine possession. Therefore, punishment for uncharged conduct is prohibited by Article 12.

II. FEDERAL SENTENCING GUIDELINES

A. Burden of Proof

In *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), the Supreme Court held that the preponderance standard generally satisfies the requirements of due process. The Court found, however, that a different question would be presented if the magnitude of a contemplated departure is sufficiently great so that the sentencing hearing can fairly be characterized as "a tail which wags the dog [24] of the substantive offense." 477 U.S. at 88.

Since this decision, the vast majority of Circuit Courts have agreed that a higher burden of proof – typically, clear and convincing evidence – should be required in situations where the sentencing hearing can be characterized as "a tail which wags the dog of the substantive offense." *See United States v. Kikumura*, 918 F.2d 1084, 1102 (3d Cir. 1990) (holding that clear and convincing standard applies to "330-month departure from the median of an applicable guideline range"); *United States v. Restrepo*, 946 F.2d 654, 656, n. 1 (9th Cir. 1991) (en banc) (suggesting that clear and convincing evidence might be required for extraordinary upward adjustments or departures), *cert. denied*, 503 U.S. 961 (1992); *United States v. Lam Kwong-Wah*, 966 F.2d 682, 688 (D.C. Cir.) (same), *cert. denied*, 506 U.S. 901 (1992); *United States v. Trujillo*, 959 F.2d 1377, 1382 (7th Cir.) (same), *cert. denied*, 506 U.S. 897 (1992); *United States v. Gigante*, 39 F.3d 42, 48 (2d Cir. 1994), as amended, 94 F.3d 53, 56 (1996) (preponderance standard is "no more than a threshold basis for adjustments and departures" and "a higher standard" should apply to "a substantially enhanced sentence

range"); *United States v. Lombard*, 72 F.3d 170, 186-87 (1st Cir. 1995) (authorizing downward departure where relevant conduct called for an "enormous" sentence enhancement); *United* [25] *States v. Townley*, 929 F.2d 365, 369 (8th Cir. 1991) ("McMillan allows for the possibility that the preponderance standard the Court approved for garden variety sentencing determinations may fail to comport with due process where, as here, a sentencing enhancement factor becomes 'a tail which wags the dog of the substantive offense' "); *but see United States v. Washington*, 11 F.3d 1510, 1516 (10th Cir. 1993) (rejecting higher standard for making "guideline calculations"), *cert. denied*, 511 U.S. 1020 (1994). Although the Eleventh Circuit has not been presented with an extreme situation, and so has not ruled on this question, it has acknowledged that other Circuit Courts have applied a higher standard in extreme situations. *See United States v. Lewis*, 115 F.3d 1531, 1536 (11th Cir. 1997) (approving preponderance standard based on facts of the case, while acknowledging that other Circuit Courts have applied a higher standard in extreme situations).

In *United States v. Bethea*, the District Court for New Jersey found that the government's burden of proof at sentencing should be clear and convincing evidence. 834 F. Supp. 659, 664 (D.N.J. 1992). The Court applied the Supreme Court's definition of the clear and convincing evidence standard that requires the trier of fact to have " 'an abiding conviction that the truth of the factual contentions are *highly probable.*' " *Bethea*, 834 F.Supp. At 664 [26] (quoting *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984)) (emphasis added).

Mr. Garcia has pled guilty to two charges, Count one which yield [sic] a sentence range under the Guidelines of 63-78 according to Mr. Garcia and 151-188 months in prison according to PSR paragraph 69) [sic] The government has requested, however, that this court deny any downward adjustments and impose upward enhancements as well as a "substantial upward departure." The government urges the court to impose a "very high sentence[ ]" that is "at or near the statutory maximum sentence of 40 years on Count I, consecutive to the mandatory five year sentence on Count III. Government's Sentencing Memorandum at 10. Thus, the government requests a 540-month sentence for convictions that should yield either a 63-78 or 151-188 months (depending which range the court finds applicable). The government would have this court sentence Mr. Garcia for an uncharged homicide. As the government concedes, such a sentence would involve a "substantial upward departure." *Id.*

Even if the court does not take the alleged homicide into account in imposing sentence, the government also requests that Mr. Garcia's base offense level be increased by four levels for a leadership enhancement, by two levels for obstruction of justice, and that substantial quantities of drugs not included in the [27] conviction offense be included. Government's Sentencing Memorandum at 1-3. These factors alone would constitute a very substantial increase in the sentence Mr. Garcia would face. The upward adjustments and departure that the government requests in this case would produce a sentencing hearing that could be characterized as "a tail which wags the dog of the substantive offense." In the Third Circuit's seminal decision in *Kikamura*, the court

applied the clear and convincing evidence standard to a 330-month enhancement from the median of an applicable guideline range, finding such to constitute "perhaps the most dramatic example imaginable of a sentencing hearing that functions as 'a tail which wags the dog of the substantive offense.' " *Kikamura*, 918 F.2d at 1099-1100.

In *Bethea* the Government offered evidence at sentencing that the defendant had committed a murder that had not been proved in obtaining the RICO conviction. The court found that the sentencing hearing could be viewed as the tail which wagged the dog. In that case, the defendant's offense level would increase from 39 to 43. The court reasoned: "If Mr. Bethea is sentenced under an offense level of 39, he may see the light of day again. If he is sentenced under an offense level of 43, he will not." *Bethea*, 834 F. Supp. at 664.

In Mr. Garcia's case the government has requested a 402-month [28] enhancement from the top of the applicable guideline range. This level of enhancement is even more dramatic than that in *Kikamura*. For a person of 37 years of age such as Mr. Garcia, the government's request transforms the sentence which he would face from 17-20 years (per PSR) to 45 years. Instead of returning to his family and community as a relatively young man, he would remain in prison until he was in his 80's. Since the 1996 Census Bureau (exhibit 24) reports that the life expectancy of a man Mr. Garcia's age is 77 years, this means he would most likely die in prison. This difference cannot be viewed as anything but dramatic and extreme, and thus, the appropriate burden of proof that the government should bear at the sentencing hearing is proof by clear and convincing evidence.

B. Standard of Admissibility of Evidence

The *Kikamura* decision also found that a higher level of reliability should be required for evidence to be admissible at sentencing in extreme situations. *Kikamura,* 918 F.2d at 1102 ("When the magnitude of the departure is so disproportionate, we believe that the sentencing court must ratchet up not only the standard of proof, but also the standard of admissibility.") Due process, the court stated, "requires more than a 'minimal indicium of reliability' " in a case where the sentencing hearing can fairly

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[49] Florida. This friendship negated the need for any explanation by Mr. Garcia to Mr. Traylor. He was not part of that conspiracy and he did not have any knowledge about it. On one other occasion Traylor rented a car for Garcia that was used to travel to Tennessee for music business purposes.

Gloria Cryer worked for or with Marty Cryer. It was the Cryers who began the conspiracy by soliciting Mr. Garica's assistance in providing marijuana. It was Marty who gave orders to buy marijuana to Gloria Cryer and Marty who paid money and directed Gloria to disburse payment. It was Marty who placed orders for marijuana through Gloria. Marty placed the last order when it wasn't needed and it was Marty who refused to pay for it. If there is an organizer or leader of this conspiracy it is Marty Cryer.

G. Drug Amounts Are Beyond Scope of Conspiracy and Inaccurate

1. Cocaine is Not Relevant Conduct and Weight is Speculative

The kilogram of cocaine for which the government requests the court to hold Mr. Garcia responsible is non existent and not relevant conduct. It is agreed that one-quarter ounce of cocaine was purchased from Benny Silva but unconnected to the delivery of marijuana from Texas to Florida. Even the prosecution's sentencing [50] memorandum does not link the possession of cocaine to the marijuana conspiracy allegations. There is no evidence that cocaine was in any way involved with the alleged conspiracy to distribute marijuana from Texas to Florida.

The weight of the cocaine is totally speculative and unreliable. The figure comes from a statement allegedly made by Kathy Ticer to a law enforcement officer, Turk. There is no evidence that she ever saw any quantity of cocaine other than what she personally consumed. Mr. Garcia contends that Ms. Ticer has misled courts in the past and has no credibility.

The amount of cocaine alleged to be delivered to Mr. Guidry in Louisiana is speculative and contains inconsistencies. David Alley claims to have made 15-20 marijuana trips to Louisiana (exhibit 15). According to the Government sentencing memorandum he made 20 trips and "about half the time he also delivered an ounce of cocaine. Government Sentencing memo pg. 3

David Alley was interviewed by the Office of The Federal Public Defender and stated that he delivered approximately 6 ounces of cocaine to Louisiana.

In reality ten trips were made to Louisiana on three occasions one ounce of cocaine were delivered.

Additionally, the Factual Basis (pg.6) alleges that Monica [51] Poole "would testify" that Garcia asked her to go to his apartment and remove cocaine. Mr. Garcia did request that she remove furnishings from his apartment but there was no mention of cocaine, because Mr. Garcia never left money or drugs in his apartment when he went out of town. (Exhibit 14)

2. Louisiana Marijuana Is Not Relevant Conduct and Weight Is Overestimated

The government requests this court to sentence Mr. Garcia based in part on 500 lbs. of marijuana allegedly sent from Texas to Louisiana. This quantity of marijuana is not correct and is not relevant conduct. Any marijuana that may have been sent to Louisiana was done as part of a separate conspiracy. *See supra* Section I. F. (Louisiana conspiracy is separate from Florida conspiracy).

Moreover, the estimation of 500 lbs. involved in the Louisiana conspiracy is inaccurate. The total amount of marijuana involved in the Louisiana conspiracy is based on rough estimations provided by David Alley in his affidavit. He stated that the amount of marijuana involved in these alleged offenses was 15-20 trips of 20-25 pounds. (Exhibit 15 at pg. 2). If Mr. Alley had known the precise total amounts involved, the government simply could have relied on his figures. Instead, he provided only rough estimates. [52] Drug quantities require individualized findings. *U.S v. Bulter* 102 F3d 1191 (11th Cir

1997) In effect, Mr. Alley stated that the amounts certainly involved at least 20 lbs. and *perhaps* up to 25 lbs. Thus, the government does not have any basis for holding Mr. Garcia accountable for anything more than the minimum total estimate. In this case, 15 trips of 20 pounds each yields a total of 300 pounds, not 500 pounds as government suggests. However, Mr. Garcia believes the total trips to be 10 and that David Ally's phone records (residential and calling card) would indicate an exact figure.

Even if this court relies on the Factual Basis for Plea submitted in this case, that document reports that *about* 20 shipments of 20-25 pounds occurred. Calculating a minimum amount yields 400 lbs. The Government is inflating the weight of marijuana with unsubstantiated reference, example: Government sentencing memo pg. 2 refers to the statement of facts for the proposition that, "Jessie Escobar also gave Garcia large amounts of marijuana. In fact page 12 of the Factual Basis reads that Garcia received "additional quantities from Escobar". Additionally, Garcia never purchased controlled substances from and is unaware of Escobar's business relationship with Silva or in what capacity they worked together, if any.

* * *

[59] Gloria Cryer's name.

The statement of facts mentions conversation between the [sic] Mr. Garcia and Gloria Cryer concerning kidnaping [sic] and the possible homicide of Marty Cryer. However, Garcia never said he would kill Marty Cryer when he found him. He disputed this statement in the

Statement of Facts, and Gloria Cryer's grand jury testimony of January 15,1992 is not consistent with this statement (exhibit 16). It was Gloria Cryer who initiated the topic of kidnaping [sic] by stating, in effect, "if there is any kidnaping [sic], take me (Gloria) not Nancy or the baby." This discussion is irrelevant to the suggestion of premeditation.

3. Punishment for Homicide As Relevant Conduct Implicates Due Process Concerns

The enhancement requested by the government in this case to account for the shooting would constitute the "tail wagging the dog" of the substantive offense. To punish Mr. Garcia for a homicide as a sentencing factor that is proved by a lesser standard of proof than beyond a reasonable doubt raises serious due process concerns.

The First Circuit in *United States v. Lombard*, 72 F.3d 170 (1st Cir. 1995), found that Due Process concerns required the defendant's sentence to be vacated and remanded for consideration [60] of a downward departure. The court had imposed a life sentence for a firearms possession conviction upon proof that the defendant had committed a murder. The court stated:

> Here, . . . the tail has wagged the dog. The consideration of murders at Lombard's sentencing upstaged his conviction for firearms possession. The circumstances of this case that have combined to produce this effect raise grave constitutional concerns, although each doctrine considered separately might not provoke a second thought.

Id. at 177. The court showed extreme dissatisfaction with the use of an uncharged murder as an "enhancing" factor:

> A charge of murder represents the archetype of conduct that 'has historically been treated in the Anglo-American legal tradition as requiring proof beyond a reasonable doubt.' Thus, a rule structure that bars conviction of a firearms charge except on proof beyond a reasonable doubt, but then permits imposition of a life sentence upon proof of a murder by a preponderance of the evidence attaches, in effect, the lesser procedural protections to the issue that would naturally be viewed as having the greater significance.

Id.

The court added that the life sentence for a firearms charge "implicates basic concerns of proportionality both between the enhancement and base sentence and between the offense and punishment as a whole." *Id.* This concern was amplified in *Lombard*, as is also true in Mr. Garcia's case, because the killings [61] were "outside the sphere of the federal prosecutor's criminal charging power."[2] *Id.* Thus, the "enhancing" procedure "raises the danger of the defendant's trial and conviction being turned into a means of achieving an end that could not be achieved directly: the imposition of a life sentence 'enhancement' based on a federally unprosecutable murder." *Id.*

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[2] Mr. Garcia could not be prosecuted for homicide because the drug quantities alleged do not meet the minimum threshold required for a CCE charge.

The fact that the murder is not federally prosecutable is significant because:

> the fact is that Congress has chosen not to federalize the state crime of murder in cases like Lombard's, and so has not authorized reprosecution for murder pursuant to the doctrine of separate sovereignties. Thus, the issue raised is not one of Double Jeopardy, nor, strictly speaking, of the reach of the federal power, but one of Due Process: whether the sentencing court is precluded from considering that the Sentencing Guidelines as applied, through the vehicle of sentence enhancement, effectively punishes the defendant for conduct as to which there exists no statutory authorization for the government even to prosecute.

Id. See also United States v. Carrozza, 4 F.3d 70 (1st Cir. 1993), *cert. denied*, 511 U.S. 1069 (1994) (expressing doubt on whether imposition of practical equivalent of life sentence would be [62] permissible based on uncharged murder).

The imposition of a sentence enhancement "at or near the top of the statutory range" as the government urges would constitute the practical equivalent of a life sentence for a homicide for which Mr. Garcia was never indicted, tried or convicted by a jury in this court, nor would the government have the power to do so if it were so inclined. Even a "clear and convincing evidence" standard does not restore the array of constitutional and other rights that are available to a person formally charged with an offense, such as the right to a jury trial, the right to discovery, the right to pre-trial rulings on the admissibility of evidence, the applicability of the Jencks

Act, etc. This sentencing procedure is surely the "tail wagging the dog," and it deprives Mr. Garcia of all the basic constitutional and statutory protections of our jury trial system that ensure fundamental fairness. This court should decline to impose an enhancement on this basis.

4. Involvement in Shooting Was Aberrational Behavior

Mr. Garcia has no history of violence. The persons who had contact with him during his five-plus years in Canada found him to be a caring and giving individual. Those who had come to know him were shocked and found it out of character to learn of the criminal charges against him. *U.S. Withrow*, 85 F 3d. 527 (11th Cir. 1996)

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